(3)

No. 00-9285

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

WALTER MICKENS, JR.,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Imminent Execution Scheduled
April 17, 2001

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United States Court of Appeals,
Fourth Circuit.

Walter MICKENS, Jr., Petitioner-Appellant,
v.
John B. TAYLOR, Warden, Sussex I State Prison, Respondent-Appellee.

No. 00-4.

Argued Dec. 5, 2000.
Decided Feb. 16, 2001.

Following affirmance of capital murder conviction and death sentence, 247 Va. 395, 442 S.E.2d 678, and affirmance of death sentence after remand for a new sentencing hearing, 252 Va. 315, 478 S.E.2d 302, petition for writ of habeas corpus was filed. The United States District Court for the Eastern District of Virginia, Robert E. Payne, J., 74 F.Supp.2d 586, denied petition, and petitioner appealed. The Court of Appeals, 227 F.3d 203, reversed. On rehearing en banc, the Court of Appeals, Widener, Circuit Judge, held that: (1) claim of conflict of interest on the part of lead trial counsel was not barred under the requirement of exhaustion or the doctrine of procedural default; (2) even if the trial court failed to inquire into a potential conflict on the part of defense counsel about which it reasonably should have known, automatic reversal was not required, absent objection by the defense; (3) petitioner was required to establish both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict; (4) petitioner must show link between adverse effect and actual conflict; and (5) petitioner failed to show adverse effect.

Affirmed.

Michael, Circuit Judge, filed a dissenting opinion, in which Diana Gribbon Motz and King, Circuit Judges, joined.

West Headnotes

[1] Federal Courts k744
170Bk744

When Court of Appeals sits en banc, it reviews the decision of the district court for error. U.S.Ct. of App. 4th Cir.Rule 35(c), 28 U.S.C.A.

[2] Criminal Law k641.5(.5)
110k641.5(.5)

A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest. U.S.C.A. Const.Amend. 6.

[3] Criminal Law k1517
110k1517

[3] Criminal Law k1519(1)
110k1519(1)

The *Strickland* standard for establishing ineffective assistance of counsel applies equally in federal collateral proceedings as it does on direct appeal, but there are exceptions to the standard, and a claim of ineffective assistance of counsel arising from counsel's conflict of interest presents a special case subject to the standard articulated by *Cuyler v. Sullivan*. U.S.C.A. Const.Amend. 6.

[4] Criminal Law k641.5(.5)
110k641.5(.5)

To establish ineffective assistance of counsel

on conflict of interest grounds, a petitioner must establish that (1) his attorney labored under an actual conflict of interest that (2) adversely affected his lawyer's performance, and after a petitioner satisfies this two-part test, prejudice is presumed. U.S.C.A. Const.Amend. 6.

[5] Habeas Corpus k314
197k314

[5] Habeas Corpus k319.1
197k319.1

The "exhaustion doctrine" bars a claim if it is raised for the first time in a federal habeas petition, while the "procedural default doctrine" bars a claim when the habeas petitioner fails to exhaust available state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.

[6] Habeas Corpus k407
197k407

A habeas petitioner can establish cause for procedural default and related lack of exhaustion by showing that the factual basis for the claim was unavailable to him at the time he filed his state habeas petition.

[7] Habeas Corpus k407
197k407

The factual predicate for habeas petitioner's conflict of interest claim, that lead defense counsel in petitioner's murder trial had represented the victim in an unrelated matter, was not available to petitioner in state court nor was it discoverable through the exercise of diligent investigation, and thus the claim was not barred under the requirement of exhaustion or the doctrine of procedural default, where it was only through a clerk's mistake that federal habeas counsel saw victim's juvenile court file, which was confidential under state law, and trial counsel had remained silent as to the prior representation. U.S.C.A. Const.Amend. 6; Va.Code 1950, § 16.1-305.

[8] Criminal Law k1166.10(3)
110k1166.10(3)

Even if the trial court failed to inquire into a potential conflict on the part of defense counsel about which it reasonably should have known, automatic reversal was not required where there was no showing of any hindrance of the defense and no objection by the defense to the conflict. U.S.C.A. Const.Amend. 6.

[9] Criminal Law k641.5(.5)
110k641.5(.5)

An objection raised by defense counsel is particularly persuasive evidence of a Sixth Amendment violation based on counsel's conflict of interest because: (1) defense counsel is in the best position to evaluate his potential conflicts of interest; (2) defense attorneys are obligated to inform the court of conflicts of interest; and (3) attorneys are officers of the court whose declarations to the court are virtually made under oath. U.S.C.A. Const.Amend. 6.

[10] Criminal Law k641.5(7)
110k641.5(7)

Trial courts have an obligation to inquire into potential conflicts of interest on the part of defense counsel when they know or reasonably should know of a particular conflict. U.S.C.A. Const.Amend. 6.

[11] Criminal Law k641.5(.5)
110k641.5(.5)

To establish ineffective assistance of counsel

arising from counsel's conflict of interest, defendant was required to establish both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known. U.S.C.A. Const.Amend. 6.

[12] Courts k90(1)
106k90(1)

Overruling by implication is not favored.

[13] Criminal Law k842
110k842

[13] Criminal Law k846
110k846

Claims of conflict of interest on the part of defense counsel present mixed questions of law and fact that Court of Appeals reviews de novo, but the habeas court's factual findings are subject to the clearly erroneous standard. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

[14] Criminal Law k641.5(.5)
110k641.5(.5)

A defendant has established an adverse effect from counsel's conflict of interest if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another, and adverse effect can arise at any stage of the litigation, including pretrial investigation or entry of a plea. U.S.C.A. Const.Amend. 6.

[15] Criminal Law k641.5(.5)
110k641.5(.5)

To establish adverse effect from counsel's conflict of interest, and thus ineffective representation, defendant was not required to establish that he would have prevailed at trial had counsel pursued the strategies that defendant now argues counsel rejected because of his conflict of interest. U.S.C.A. Const.Amend. 6.

[16] Habeas Corpus k721(3)
197k721(3)

Habeas petitioner must establish by a preponderance of the evidence adverse effect from trial counsel's conflict of interest. U.S.C.A. Const.Amend. 6.

[17] Criminal Law k641.5(.5)
110k641.5(.5)

There is a three-part standard for showing by defendant of an adverse effect from trial defense counsel's conflict of interest; first, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued; second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case; and, finally, the petitioner must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict. U.S.C.A. Const.Amend. 6.

[18] Criminal Law k641.5(.5)
110k641.5(.5)

Habeas petitioner failed to show that any actual conflict of interest of lead defense counsel at trial for murder and attempted forcible sodomy, based on fact the counsel had been representing victim on an unrelated matter at the time of his death, had an adverse effect on the defense, so as to constitute ineffective assistance, in that many of petitioner's assertions of adverse effect were not viable defense strategies and any viable defense strategies were not linked to his attorney's conflict of interest; petitioner asserted, inter alia, that his attorney failed to

raise as a defense that victim had consented to sodomy, failed to investigate victim's background or to present any negative information about victim at trial, and failed to engage in meaningful plea negotiations. U.S.C.A. Const.Amend. 6.

[19] Habeas Corpus k380.1
197k380.1

Habeas petitioner's claims of inadequate investigation by trial counsel, and of insufficient evidence, were defaulted where he had not fairly presented them to the state courts.

[20] Criminal Law k641.13(7)
110k641.13(7)

Defense counsel was not ineffective in failing to retain a mental health expert to evaluate defendant for the resentencing, where defendant had been examined by a psychiatrist on the motion of counsel and defendant did not establish what new information a mental health expert would have discovered beyond what counsel already knew at the time of the resentencing. U.S.C.A. Const.Amend. 6.

[21] Habeas Corpus k406
197k406

Ineffective assistance by state habeas counsel fails to establish cause for default of claims of ineffective assistance of trial counsel raised for the first time in federal habeas petition.

[22] Criminal Law k641.13(1)
110k641.13(1)

The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding, and that guarantee does not guarantee an ideal or perfect representation. U.S.C.A. Const.Amend. 6.

***351 ARGUED:** Robert James Wagner, Wagner & Wagner, Richmond, Virginia, for Appellant. Robert Quentin Harris, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellee. **On BRIEF:** Robert E. Lee, Jr., Virginia Capital Representation Resource Center, Richmond, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellee.

Before WILKINSON, Chief Judge, and WIDENER, WILKINS, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, and KING, Circuit Judges.

Affirmed by published opinion. Judge WIDENER wrote the majority opinion, in which Chief Judge WILKINSON and Judges WILKINS, NIEMEYER, LUTTIG, WILLIAMS, and TRAXLER joined. Judge MICHAEL wrote a dissenting opinion, in which Judge MOTZ and Judge KING joined.

OPINION

WIDENER, Circuit Judge:

In 1993 a jury in the Circuit Court of the City of Newport News, Virginia convicted Walter Mickens (Mickens) of the capital murder of Timothy Hall (Hall). Mickens was sentenced to death. Mickens' federal habeas attorney later discovered during the preparation of Mickens' federal habeas corpus petition that Mickens' trial counsel had just previously represented Hall on a charge unrelated to Hall's death. Mickens argues that, because of this prior representation, his attorney labored under a conflict of interest that rendered his representation of Mickens inadequate to satisfy Mickens' Sixth Amendment guarantee of effective counsel. Principally, because

Mickens has failed to show that such conflict of interest adversely affected the quality of his representation, we deny Mickens' petition for habeas corpus relief. We hold the incidental claims of Mickens are also without merit.

I.

We describe the facts of this crime as they have been summarized by the Supreme Court of Virginia, *Mickens v. Commonwealth*, ***352** 247 Va. 395, 442 S.E.2d 678, 681-83 (1994). See 28 U.S.C. § 2254(e)(1).

On March 28, 1992, Timothy Hall, age seventeen, lived with his fourteen-year- old friend, Raheem Gordon, and Gordon's father in Gordon's Newport News, Virginia apartment. Hall and Gordon often shared clothes, and Hall was wearing his roommate's Nike brand "Cross Trainer" tennis shoes on that night. Between 7:00 and 8:00 p.m. that evening, Hall drove young Gordon to a party in a nearby apartment building. Hall's stated intention was to return to the party later in the evening, but he never arrived.

Around 8:00 p.m., shortly after Gordon's arrival at the party, two other guests at the party, Vincent West and Bruce Mitchell, left the party and went to a nearby convenience store. After leaving the convenience store, West and Mitchell took their purchases to a public park adjacent to the apartment building in which the party was held. While sitting in the park, West and Mitchell saw a man with a bicycle hiding in some bushes and looking at them. The man was later identified as the petitioner, Walter Mickens.

The following day, Gordon saw Hall's automobile parked near the site of the party in the same place it had been parked the previous night. On March 30, 1992, two days after the party, a man walking along the James River in Newport News saw a body beneath an abandoned construction company building. The body was lying face down on a mattress under a sheet of plywood. The body was nude from the waist down, except for socks, and its legs were spread apart. Pubic hairs were recovered from the buttocks of the body. There were bloody "transfer" stains on the outsides of the victim's thighs, and there was a white liquid substance close to his anus. The victim was identified as Timothy Hall.

An autopsy revealed that Hall had suffered 143 separate "sharp force injuries." The medical examiner concluded that Hall had bled to death and that 25 of the wounds were fatal, including stab wounds to the lungs, skull and brain, liver, neck and jugular vein. The examiner opined that the fatal wounds may not have caused instant death, that Hall could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, he may have been conscious.

On the evening of April 4, 1992, five days after Hall's body was found, Officer D.A. Seals and Detective Dallas Mitchell of the Newport News police responded to a complaint that a black male traveling on a bicycle had assaulted a juvenile. They soon found Mickens, who is black, riding a bicycle in the parking area of the abandoned construction company building where Hall's body had been found. When Officer Seals displayed his badge and approached Mickens, Mickens fled on his bicycle. Mitchell and Seals followed Mickens and took him into custody as he was being detained by other officers. They arrested Mickens on charges involving the assault on the juvenile.

Mickens agreed to talk with the police after being advised of his Miranda rights.

Without telling Mickens how Hall had been murdered, Detective Mitchell told Mickens that he knew Mickens had killed Hall. Mickens denied any involvement in Hall's murder asserting, "You didn't find any knife on me, did you?" The following morning, the police obtained warrants charging Mickens with the murder and attempted sodomy of Hall. When Officer Seals handed Mickens the warrants, Mickens said, "I accept the warrants; I accept the charges." Seals asked Mickens what he meant by that, and Mickens responded, "Mother f___ r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael Jacobs wearing the Nike brand "Cross Trainer" shoes that Hall borrowed from Gordon and had been wearing when Gordon last saw him alive. Jacobs testified that he bought the shoes from Mickens ***353** for $5.00 the previous week, the same week Hall's body was found.

At trial, expert witnesses presented by the Commonwealth testified that the pubic hairs removed from Hall's buttocks were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens. Tissue attached to the roots of the hairs indicated that the hairs had been forcibly removed, possibly by the rubbing of the assailant's genitals against Hall's buttocks. A sample of human sperm was recovered from the cover of the mattress on which Hall's body was found. DNA analysis (RFLP type) of the sample revealed that Hall could not have produced the sperm. Mickens' DNA pattern was consistent with the DNA pattern in the sperm, however. According to expert testimony presented by the Commonwealth, approximately one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics could have produced sperm consistent with the sample taken from the mattress.

The Commonwealth also presented the testimony of Tyrone Brister, who had been confined in a holding cell at the courthouse with Mickens on March 26, 1993, about a year after Hall's murder. Brister testified that he had asked Mickens why he was in the holding cell and Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

Mickens was convicted of the capital murder of Timothy Hall under a statute making it a capital offense to commit a premeditated murder during or following the commission of attempted forcible sodomy. See Va.Code Ann. § 18.2-31(5). The jury found that the murder of Timothy Hall was outrageously and wantonly vile and sentenced Mickens to death. The Supreme Court of Virginia affirmed. See *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994). The United States Supreme Court granted Mickens' first petition for certiorari and remanded the case "for further consideration in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)." *Mickens v. Virginia*, 513 U.S. 922, 115 S.Ct. 307, 130 L.Ed.2d 271 (1994). On remand the Supreme Court of Virginia concluded that *Simmons* mandated a new sentencing hearing because "the jury was entitled to be informed of Mickens' parole ineligibility." *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9, 10 (1995). [FN1] On February 5-8, 1996, the trial court held a new sentencing hearing. The jury again fixed Mickens' sentence at death. Mickens appealed, the Supreme Court of Virginia affirmed the sentence, *Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302, 307 (1996), and the United States Supreme Court denied certiorari, *Mickens v. Virginia*, 520 U.S. 1269, 117 S.Ct. 2442, 138 L.Ed.2d 202 (1997). The Supreme Court of Virginia denied Mickens' petition for a writ of habeas corpus on December 15, 1997.

FN1. Mickens previously had been twice convicted of robbery, not to mention other convictions. See Va.Code § 53.1-151(B1).

On June 25, 1998, Mickens filed a petition in federal district court for a writ of habeas corpus under 28 U.S.C. § 2254 (2000). While investigating Mickens' case, Mickens' court-appointed federal habeas counsel was the first to discover that Mickens' lead trial counsel, Bryan Saunders (Saunders), labored under a potential conflict of interest. [FN2] The Federal habeas attorney had gone to the Newport News Juvenile and Domestic Relations Court to review Mickens' juvenile case file. While there, counsel also asked the clerk on duty ***354** for any files involving Timothy Hall. Although juvenile case files are kept confidential under Virginia law, see Va. Code Ann. § 16.1-305, the clerk mistakenly produced Hall's file. Hall's juvenile file revealed that, at the time of Hall's death, Saunders was representing him on assault and concealed weapon charges. The assault charge originated on February 21, 1992, when Hall's mother swore out a warrant alleging that her son repeatedly had grabbed her by her arms and shoved her to the ground. Hall was charged again on March 13, 1992, when the Newport News police found him in possession of a concealed weapon, a serrated bread knife wrapped in paper. When Hall appeared before the Juvenile and Domestic Relations Court on March 20, 1992, Judge Paul Criver, Jr. appointed Saunders to represent Hall on the two charges. A hearing in the matter was continued until April 3, 1992. Sometime between March 20 and March 28, 1992, when Hall was last seen alive, Hall came to Saunders' office for an interview that lasted between fifteen and thirty minutes. They discussed the circumstances surrounding each of the charged crimes.

FN2. We take the facts relating to Saunders' representation of Mickens from the decision of the district court denying Mickens' petition for federal habeas corpus relief. See *Mickens v. Greene*, 74 F.Supp.2d 586 (E.D.Va.1999).

On Friday, April 3, 1992, four days after Hall's body was discovered, Judge Aundria Foster of the Juvenile and Domestic Relations Court dismissed the charges against Hall, noting that he was deceased. Judge Foster's handwritten order was entered on the individual docket sheet for Hall's case. The docket sheet was a single page that included Hall's full name, his date of birth, the charges against him, an abbreviated history of the proceedings, and the identity of his appointed lawyer, Bryan Saunders. That same day Saunders went to the courthouse for the scheduled hearing in Hall's case, and someone, Saunders does not recall whom, told him that Hall was dead and that the case had been dismissed. There is no evidence that Saunders appeared before Judge Foster on the day that the charges against Hall were dismissed. Mickens was arrested the next day, Saturday, April 4, 1992. On the following Monday, April 6, 1992, Judge Foster, the same judge who handled the dismissal of Hall's case, appointed Saunders to represent Mickens in his trial for the capital murder of Hall. Mickens' arrest warrants, which appear to have been before Judge Foster when she appointed Saunders, charged that "on or about March 30, 1992" Mickens murdered "Timothy Jason Hall, white male, age 17, by stabbing, and during the commission of an abduction, and sodomy as well as robbery." [FN3] Judge Foster did

not inquire into whether Saunders would have a conflict in representing Mickens.

> FN3. The robbery and abduction charges were later dismissed for lack of probable cause by Judge Foster at Mickens' preliminary hearing.

Saunders represented Mickens at the guilt phase of his murder trial and at both of his sentencing hearings. Saunders worked with court-appointed co- counsel, Warren Keeling, but Saunders was responsible for about ninety percent of the workload. Keeling took primary responsibility for the sentencing hearings, however. Neither Saunders nor Keeling represented Mickens on his petition for state habeas corpus relief. Saunders never told Mickens or Keeling that he had represented Hall, and Mickens did not learn about the prior representation until federal habeas counsel discovered it in Hall's juvenile file.

The district court denied Mickens' petition for federal habeas corpus relief. *Mickens v. Greene,* 74 F.Supp.2d 586 (E.D.Va.1999). The court rejected Mickens' conflict of interest claim after concluding that "the possible conflict of interest presented by Saunders' successive representation of Hall and Mickens never ripened into an actual conflict nor was Saunders' advocacy impaired thereby." *Mickens v. Greene,* 74 F.Supp.2d at 615. The district court also rejected Mickens' other claims, including those for ineffective ***355** assistance of counsel and insufficiency of evidence. Mickens appealed, and, on September 14, 2000, a divided panel of this court reversed the decision of the district court. See *Mickens v. Taylor,* 227 F.3d 203 (4th Cir.2000).

The Commonwealth's petition for rehearing en banc was granted, and on December 5, 2000, the case was argued before the en banc court. We now affirm.

[1] When this court sits en banc, we review the decision of the district court for error. See 4th Cir.R. 35(c). Because Mickens filed his federal habeas petition after the April 24, 1996, enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, we apply 28 U.S.C. § 2254 as amended by the AEDPA. See *Mueller v. Angelone,* 181 F.3d 557, 565-72 (4th Cir.), *cert. denied,* 527 U.S. 1065, 120 S.Ct. 37, 144 L.Ed.2d 839 (1999).

II.

[2][3] A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest. See *Cuyler v. Sullivan,* 446 U.S. 335, 345-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *United States v. Tatum,* 943 F.2d 370, 375 (4th Cir.1991). The Supreme Court has most clearly articulated the threshold for establishing ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail, a petitioner alleging ineffective assistance of counsel must establish, (1) that his attorney's representation fell below an objectively reasonable performance and (2) that the inadequate performance prejudiced the petitioner's case. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. This constitutional standard for establishing ineffective assistance of counsel applies equally in federal collateral proceedings as it does on direct appeal. *Strickland,* 466 U.S. at 697, 104 S.Ct. 2052.

[4] Even as the *Strickland* court clarified the applicable standard for ineffective assistance of counsel, however, it recognized special circumstances addressed by its prior decisions and noted exceptions to the new standard it articulated. The *Strickland* Court recognized that a claim of ineffective assistance of counsel arising from counsel's conflict of interest presents a special case subject to the standard articulated by *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). See *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052. To establish ineffective assistance of counsel on conflict of interest grounds, a petitioner must establish that (1) his attorney labored under "an actual conflict of interest" that (2) "adversely affected his lawyer's performance." See *Sullivan,* 446 U.S. at 348. After a petitioner satisfies this two-part test, prejudice is presumed. *Sullivan,* 446 U.S. at 349, 100 S.Ct. 1708.

Mickens presents three alternative arguments for habeas corpus relief on conflict of interest grounds. First, Mickens argues that the trial court's failure to inquire into the extent of his attorney's potential conflict of interest even though the court reasonably should have known of that conflict mandates automatic reversal of his conviction. Second, Mickens argues that, even if the trial court's failure to inquire into his attorney's potential conflict does not require automatic reversal, it relieves him of his burden under *Sullivan* of establishing that the conflict of interest adversely affected his representation. Finally, Mickens argues that he has satisfied both elements of the two-part *Sullivan* test and that the district court erred in ruling that his attorney did not labor under an actual conflict of interest that adversely affected his representation. We conclude that *Sullivan* requires Mickens to establish both an actual conflict of interest and an adverse ***356** effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known. Because we find that Mickens has failed to show an adverse effect, we affirm the decision of the district court and deny Mickens' petition without deciding whether Mickens has demonstrated that his attorney labored under an actual conflict of interest.

[5] Before we examine the merits of Mickens' conflict of interest claim, we address the Commonwealth's argument that his claim is barred under the requirement for exhaustion and the doctrine of procedural default. The exhaustion doctrine bars a claim if it is raised for the first time in a federal habeas petition. See *Breard v. Pruett,* 134 F.3d 615, 619 (4th Cir.) (citing *Matthews v. Evatt,* 105 F.3d 907, 911 (4th Cir.1997)), *cert. denied,* 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998). The procedural default doctrine bars a claim when the habeas petitioner "fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.' " *Breard,* 134 F.3d at 619 (quoting *Coleman v. Thompson,* 501 U.S. 722, 735 n. *, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).

[6][7] In a case in the procedural posture present here, a petitioner may overcome both the procedural default and related exhaustion bar by showing cause for the default and actual prejudice arising from the asserted constitutional error. See *Breard,* 134 F.3d at 620. A petitioner can establish cause by showing "that the factual basis for [the] claim was unavailable to him at the time he filed his state habeas petition." *Breard,* 134 F.3d at 620; see *McCleskey v. Zant,* 499 U.S. 467, 493-94, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Williams v. French,* 146 F.3d 203, 209 (4th Cir.1998). The district court concluded that Mickens established cause: "Here, Saunders' silence

and state law requirements for secrecy of juvenile court records operated together to preclude Mickens from raising the conflict of interest claims in his state habeas petition." *Mickens v. Greene,* 74 F.Supp.2d at 600. The Commonwealth argues that if Mickens' federal habeas counsel was able to discover Saunders' prior representation of Hall, then Mickens' state habeas counsel also could have done so. Virginia law, however, requires juvenile court records to be kept confidential and prohibits their production absent a court order. See Va.Code Ann. § 16.1-305. As the district court found, "the fortuitous circumstances by which federal habeas counsel discovered the truth about Saunders' conflict prove beyond question that Mickens did not fail in his duty to inquire in the state court proceedings." *Mickens v. Greene,* 74 F.Supp.2d at 601 (citing *Amadeo v. Zant,* 486 U.S. 214, 224, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988)). It was only through a clerk's mistake that federal habeas counsel saw Hall's juvenile court file, and as soon as a supervisor discovered the error, the file was taken from federal habeas counsel. Under these circumstances, we agree with the district court that "the factual predicate for [the conflicts claim] was not available to Mickens in state court nor was it discoverable through the exercise of diligent investigation." *Mickens v. Greene,* 74 F.Supp.2d at 602. Mickens has established cause.

To establish prejudice adequate to excuse his default, a petitioner must show that his counsel's error created more than the "possibility of prejudice" but instead that it "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady,* 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). The Supreme Court has identified Sixth Amendment conflict of interest cases as a special circumstance, however, in which prejudice for purposes of the ineffective assistance of counsel inquiry is presumed once a petitioner establishes both of the ***357** two aspects of the underlying conflict of interest claim. See *Sullivan,* 446 U.S. at 349-50, 100 S.Ct. 1708. Our inquiry as to prejudice for purposes of excusing Mickens' default thus incorporates the test for evaluating his underlying conflict of interest claim. See *Williams,* 146 F.3d at 212-13 (analyzing actual prejudice for purposes of procedural default by examining the merits of petitioner's conflict of interest claim); *Rosenwald v. United States,* 898 F.2d 585, 587 (7th Cir.1990) (concluding that to show actual prejudice the petitioner must establish the merits of his *Sullivan* claim). Accordingly, we turn to the merits of Mickens' conflict of interest claim.

III.

A.

[8] Mickens argues that the Sixth Amendment mandates automatic reversal of his conviction because the trial court reasonably should have known of his attorney's potential conflict of interest but failed to inquire into the extent of that conflict. Mickens cites *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), and *Wood v. Georgia,* 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), in support of this proposition. We accept for purposes of discussion, without deciding the issue, that Judge Foster, who appointed Saunders to represent Mickens, reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall.

We are of opinion, however, that the decision in *Holloway v. Arkansas* does not require automatic reversal of Mickens' conviction. *Holloway* dealt with a specific circumstance, not present here, in which a

trial court failed to inquire into a potential conflict despite defense counsel's objections. In *Holloway,* the trial court required one defense attorney to represent three co-defendants in a joint trial despite repeated objections by defense counsel that the joint representation hampered his ability to represent any of the defendants adequately. Notably, he could not cross-examine any of those from whom he had confidential information. *Holloway,* 435 U.S. at 478-80, 98 S.Ct. 1173. The *Holloway* trial court declined to inquire into prejudice arising from the conflicted representation. While the state court affirmed the two convictions, the Supreme Court reversed the convictions based solely on the trial court's failure, in the face of repeated representations by the single attorney of his impossible burden, to either ascertain the risk of joint representation or appoint separate counsel. *Holloway,* 435 U.S. at 483-84, 98 S.Ct. 1173.

[9] The *Holloway* Court cited two reasons for finding a Sixth Amendment violation under such circumstances: the obligation of the trial court to protect the right of the accused to have effective assistance of counsel and the trustworthiness of defense counsel's objection that his representation is hampered by a conflict of interest. *Holloway,* 435 U.S. at 484-85, 98 S.Ct. 1173. An objection raised by defense counsel is particularly persuasive evidence of a Sixth Amendment violation because: (1) defense counsel is in the best position to evaluate his potential conflicts of interest; (2) defense attorneys are obligated to inform the court of conflicts of interest; and (3) attorneys are officers of the court whose declarations to the court are "virtually made under oath." *Holloway,* 435 U.S. at 485-86, 98 S.Ct. 1173. The Court stated "We find these considerations persuasive." We think that the rule of *Holloway* should not apply in a case such as this where there has been no showing of any hindrance of the defense and no objection by the defense to the conflict. In fact, *Holloway* specifically declined to clarify the extent of a trial court's obligation to inquire into a conflict of interest absent an objection by the defense. *Holloway,* 435 U.S. at 483-84, 98 S.Ct. 1173.

Following *Holloway,* the Court, in *Cuyler v. Sullivan,* again addressed a trial court's duty to inquire into conflicts of ***358** interest, noting that a trial court must inquire into a conflict of interest when it "knows or reasonably should know that a particular conflict exists." *Sullivan,* 446 U.S. at 347, 100 S.Ct. 1708. The *Sullivan* Court did not extend the *Holloway* reversal rule, however, beyond the facts of *Holloway* to all circumstances in which the defense did not object to a conflict of interest at trial. Absent such an objection, a petitioner must satisfy the two-part conflict-of-interest standard identified by *Sullivan,* establishing both an actual conflict and an adverse effect. The *Sullivan* Court recognized this distinction when it noted that "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan,* 446 U.S. at 348, 100 S.Ct. 1708. [FN4]

> FN4. While the cases may seem to emphasize lack of objection, we think that the fact of the associated failure to offer to a defendant an opportunity to object to or waive objection to questionable representation is also of consequence.

[10] Mickens argues that a footnote in *Wood v. Georgia* changed the rule of *Sullivan* and extended the automatic reversal rule of *Holloway* to circumstances in which a trial court ignores a conflict about which it reasonably should have known. *Wood,* 450 U.S. at 273 n. 18, 101 S.Ct. 1097. [FN5] In *Wood,* the Court addressed a conflict of interest issue apparent on the face of the

record even though the conflict had not been addressed below. *Wood,* 450 U.S. at 262-63, 101 S.Ct. 1097. Because the case arose as an appeal from a revocation of probation, the Court analyzed the conflict under the due process clause, rather than Sixth Amendment grounds. *Wood,* 450 U.S. at 271-72, 101 S.Ct. 1097. Nonetheless, the Court cited *Sullivan* for the proposition that the Sixth Amendment ensures a right to counsel free from conflict of interest. *Wood,* 450 U.S. at 271, 101 S.Ct. 1097. Without the benefit of briefing, the *Wood* Court could not determine whether defense counsel in the case before the Court labored under an actual conflict of interest. *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. The record was adequate to establish, however, "that the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the [trial] court a duty to inquire further." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. The court noted that "any doubt as to whether the court should have been aware of the [conflict] problem is dispelled by the fact that the [prosecution] raised the conflict problem explicitly" at trial. *Wood,* 450 U.S. at 272-73, 101 S.Ct. 1097. The *Wood* Court thus clarified that trial courts have an obligation to inquire into potential conflicts of interest when they know or reasonably should know of a particular conflict. The Supreme Court remanded the case and instructed the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed." *Wood,* 450 U.S. at 273, 101 S.Ct. 1097. However, and we emphasize, the Court did *not* find a due process violation, rather, the Court held that, "Instead, we remand this case for further findings concerning a possible due process violation." *Wood,* 450 U.S. at 263, 101 S.Ct. 1097.

> FN5. That part of the footnote is: "Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' "

While Mickens, of course, should not be faulted for advocating the adoption of what he argues is an automatic reversal rule in the *Wood* footnote, we are of opinion that the adoption of such a rule requiring reversal in such cases would be an overly literal application of the language in that footnote. We say this for three reasons. [FN6]

> FN6. We recognize that one circuit has apparently applied *Wood* to create a rule of automatic reversal for cases in which a trial court has-failed to inquire into a conflict about which it reasonably should have known. See *Ciak v. United States,* 59 F.3d 296, 302 (2d Cir.1995) (reversing a conviction on the grounds that "the Supreme Court in *Wood v. Georgia* stated that *Cuyler* ... requires reversal where a trial court neglects its duty to inquire about a particular conflict") (citations omitted). Several of the circuits, including our own, have cited the automatic reversal rule but have not applied it to reverse a conviction. See *United States v. Tatum,* 943 F.2d 370, 379 (4th Cir.1991); *United States v. Crespo de Llano,* 830 F.2d 1532, 1538 (9th Cir.1987); *United States v. Cirrincione,* 780 F.2d 620, 625 (7th Cir.1985); *United States v. Burney,* 756 F.2d 787, 791 (10 Cir.1985). One other circuit, however, has read *Wood* as we do. See *Brien v. United States,* 695 F.2d 10, 15 n. 10 (1st Cir.1982) (rejecting the automatic reversal rule because the *Wood* court "did not require an automatic reversal of the conviction but merely remanded the case to enable the trial court to conduct the necessary inquiry, the implication being that the convictions would only be overturned if an actual conflict were found").

***359** First, the decision itself in the *Wood* case, as we have noted, did not reach the merits of the due process issue. The decision remanded the case for further findings concerning a possible due process violation.

Second, footnote 18 in the *Wood* case was in response to the aspect of Justice White's dissent which took issue with jurisdiction to vacate the judgment on a Constitutional ground. Reading that footnote to require reversal in each case in which the trial court has failed to make an inquiry when it might know or should know of a conflict, we think leads to an application of the footnote of the court beyond that which was intended.

Third, in our own case of *United States v. Tatum,* we also *referred* to footnote 18 in *Wood, Tatum,* 943 F.2d at 379, but we *applied* the rules of *Strickland* and *Sullivan,* that there are two requirements for relief in such cases, "an *actual conflict* of interest resulting in an *adverse effect* on counsel's performance," *Tatum,* 943 F.2d at 375 (italics in original), and we went on to show that there was an adverse effect on counsel's performance, pretrial strategies were adversely affected in that case, one trial counsel was dependent on another for aid in the defense, and obvious avenues for a full defense were not pursued. *Tatum,* 943 F.2d at 380.

Thus, we are of opinion that the intervening footnote 18 in *Wood* did not change the rule of *Strickland* and *Sullivan.* No adverse effect on the representation of Mickens by his trial attorney having been shown, we hold that there was no Constitutional error shown in this case to require a vacation of Mickens' conviction on account of the fact that Saunders had represented Hall on an entirely unrelated charge at the time of Hall's death at the hands of Mickens.

B.

[11][12] Mickens now asserts an alternative reading of the *Wood* decision in his opposition to rehearing that we now address. Mickens argues that, even if *Wood* does not compel automatic reversal of his conviction, it relieves him of his burden under *Sullivan* of establishing an adverse effect on his representation in a case where the trial court failed to inquire into a potential conflict about which it reasonably should have known. Mickens notes that the *Wood* Court remanded to the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed" with an instruction to award a new hearing if "an actual conflict of interest existed at that time" but did not expressly require the trial court to identify an adverse effect. *Wood,* 450 U.S. at 274, 101 S.Ct. 1097. Mickens concludes from this remand instruction that the *Wood* court eliminated the adverse effect requirement in cases where the trial court failed to inquire into a conflict of interest about which it reasonably should have known. *Wood,* 450 U.S. at 273, 101 S.Ct. 1097. Thus, Mickens reads *Wood* to have overruled by implication the second part of *Sullivan*'s two-part standard. However, "[o]verruling by implication is not favored." *Catawba Indian Tribe of South Carolina v. South Carolina,* 978 F.2d 1334, 1347 (4th Cir.1992).

***360** But the *Wood* Court noted that "[o]n the record before us, we cannot be sure whether counsel was *influenced in his basic strategic decisions* by the interests of the employer who hired him." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097 (emphasis added). *If defense counsel had been so influenced,* the

Court stated, "the due process rights of petitioners were not respected." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. After these observations, the Court concluded that it was difficult "to determine whether an actual conflict of interest was present." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. Those comments underscore that the Court was searching the record not just for a conflict of interest, but also for some indication that the conflict adversely affected the attorney's representation of the defendants. When read in this light, the *Wood* Court's terse instruction to the trial court on remand cannot bear the constitutional weight Mickens ascribes to it. The Court used the term "actual conflict" to refer to a conflict of interest that has adversely affected defense counsel's "basic strategic decisions." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. As this court has recognized, the two requirements of the *Sullivan* test, "an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum,* 943 F.2d at 375. The *Wood* Court's instruction to the trial court amounts to no more than shorthand for an explicit two-part test that the *Wood* Court did not even have occasion to quote in its majority decision, much less to overrule. Thus, we hold that *Wood* does not relieve Mickens of showing an adverse effect on his attorney's representation.

C.

We now turn to Mickens' argument that the district court erred in deciding that any actual conflict of interest did not adversely affect his representation by Saunders. Because *Sullivan* requires Mickens to demonstrate both an actual conflict and an adverse effect and because we find that Mickens has failed to identify an adverse effect, as noted, we do not reach his argument that he has established an actual conflict of interest.

[13] Conflicts claims present "mixed questions of law and fact that we review de novo." *Williams v. French,* 146 F.3d 203, 212 (4th Cir.) (citing *Sullivan,* 446 U.S. at 342, 100 S.Ct. 1708), *cert. denied,* 525 U.S. 1155, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999). The district court's factual findings, however, "are subject to the clearly erroneous standard set forth in Rule 52(a), Fed.R.Civ.P." *Fields v. Attorney General,* 956 F.2d 1290, 1297 n. 18 (4th Cir.1992). Because much of the adverse effect inquiry is heavily fact dependent, we believe appropriate deference should be given to the findings of the district court. In this respect, we note that a significant part of the testimony was taken orally, and the district judge saw the witnesses and heard them testify. We also note that the opinion of the district court was complete, thorough, and thoughtful.

[14][15] A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another. See *Tatum,* 943 F.2d at 376. Thus, both taking action and failing to take actions "that are clearly suggested by the circumstances" can indicate an adverse effect. *Tatum,* 943 F.2d at 376. An adverse effect can arise at any stage of the litigation including pretrial investigation or entry of a plea. See *Tatum,* 943 F.2d at 376. In this case, Mickens argues that Saunders' continuing duty to Hall prevented him from taking action and pursuing strategies on behalf of Mickens. Of course, *Sullivan* does not require Mickens to establish that he would have prevailed at trial had Saunders pursued the strategies that Mickens now argues Saunders rejected because of his conflict of interest.

***361** [16][17] Based on our holding in *Tatum,* 943 F.2d at 376, we agree with the district court's articulation of a three-part standard for showing an adverse effect which, as in any other civil action, Mickens must establish by a preponderance of the evidence. *Mickens v. Greene,* 74 F.Supp.2d at 603-04 (citing *Freund v. Butterworth,* 165 F.3d 839, 860 (11th Cir.1999) (en banc)). We add that *Freund* is not different in any significant way from our cases of *Williams v. French,* 146 F.3d 203, 212-13 (4th Cir.1998), and *Tatum,* 943 F.2d at 376. First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. In the language of *Tatum,* the petitioner must show that the alternative strategy or tactic was "clearly suggested by the circumstances." *Tatum,* 943 F.2d at 376. Finally, the petitioner must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Mickens challenges this standard, arguing that neither this circuit nor the Supreme Court has required a petitioner to establish a link between an adverse effect and an actual conflict. Such a link is implicit, however, in the Supreme Court's requirement that a petitioner show that "his counsel actively represented conflicting interests" and "that a conflict of interest actually affected the adequacy of his representation." *Sullivan,* 446 U.S. at 350, 349, 100 S.Ct. 1708. As this court has noted, the two requirements, "an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum,* 943 F.2d at 375. We conclude that the district court applied the appropriate standard to evaluate the adverse effects asserted by Mickens.

[18] The district court carefully considered each of Mickens' claims of adverse effect. Mickens argues that his attorney failed to raise as a defense that Hall had consented to sodomy; failed to investigate Hall's background or to present any negative information about Hall at trial; failed to engage in meaningful plea negotiations; failed to present evidence at sentencing regarding Hall's pending charges or strained relationship with his mother; failed to share information with his co-counsel; failed to investigate leads indicating an alternative perpetrator of the crime; failed to investigate Hall's juvenile file; and failed to adequately cross-examine a key prosecution witness. The district court considered each of these arguments in detail.

The district court concluded that a consent defense was not viable because of evidence that Hall had been subjected to a choke hold and stabbed some 140 times before or during the act of sodomy or attempted sodomy. *Mickens v. Greene,* 74 F.Supp.2d at 607. In addition, the district court noted that Mickens denied ever meeting Hall. *Mickens v. Greene,* 74 F.Supp.2d at 607. Because Saunders was entitled to rely on the information provided by his client, consensual sodomy was not a viable defense strategy at the time that Saunders made his decision not to pursue it. See *Royal v. Taylor,* 188 F.3d 239, 248-49 (4th Cir.1999); *Roach v. Martin,* 757 F.2d 1463, 1476-80 (4th Cir.1985).

Neither was the district court persuaded that Mickens suffered an adverse effect because of Saunders' failure to investigate or to raise negative information about Hall. The district court concluded that Saunders did not possess sufficient information relating to rumors that Hall was a male prostitute to warrant an investigation and that, in any event, presentation of such evidence would have been counter-productive and would

have been inconsistent with Mickens' assertions of sympathy for the victim and his family. *Mickens v. Greene,* 74 F.Supp.2d at 608. By the same ***362** token, the district court concluded that evidence related to Hall's assault charge on his mother would have been of limited value. The only conceivably admissible purpose for the evidence would have been impeachment of Hall's mother at the sentencing hearing after she testified about the extent of her grief. *Mickens v. Greene,* 74 F.Supp.2d at 608. Choosing not to vilify the mother of the victim cannot be the mark of incompetent counsel by any measure. For obvious reasons, questioning the mother on that point would have been an unattractive strategy. Ultimately, Saunders' co-counsel was primarily responsible for the sentencing hearing, was aware of this information, and made the decision not to use it at the sentencing hearing; so this strategic decision was unrelated to Saunders' conflict of interest. *Mickens v. Greene,* 74 F.Supp.2d at 608.

The district court also concluded that Saunders' failure to pursue plea negotiations was not based on his conflict of interest but rather on the unwillingness of the prosecution to bargain. *Mickens v. Greene,* 74 F.Supp.2d at 609. The district court found as a nonviable strategy Mickens' argument that evidence should have been introduced as to Hall's claimed assault on his mother, and we agree. Not only was it inconsistent with Mickens' expression of regret for the mother's pain, proving that a decedent has asked for what he got is a defense better reserved for the defense of prosecutions such as murder and manslaughter. *Mickens v. Greene,* 74 F.Supp.2d at 609-10.

The district court also concluded that Saunders' failure to investigate into matters identified by Mickens was either harmless or unrelated to Saunders' conflict of interest. *Mickens v. Greene,* 74 F.Supp.2d at 610-12. In particular, the district court attributed Saunders' failure to inquire into leads as to possible alternative perpetrators of the murder to the weak nature of the leads, rather than to Saunders' conflict of interest. *Mickens v Greene,* 74 F.Supp.2d at 611-12. The district court also found that Saunders' failure to investigate Hall's juvenile file, while unreasonable, created no adverse effect on Saunders' representation of Mickens because the file contained no information pertinent to Mickens' case. *Mickens v. Greene,* 74 F.Supp.2d at 611. The district court rejected Mickens' claim that Saunders failed adequately to cross-examine a key prosecution witness as defaulted for failure to raise the issue in state court. *Mickens v. Greene,* 74 F.Supp.2d at 595-96. In any event, Mickens has failed to establish any link between the failure to adequately cross-examine the witness and Saunders' potential conflict of interest.

Finally, the district court considered and rejected Mickens' contention that Saunders concealed his prior representation of Hall from his co-counsel out of a conflicting personal interest in remaining assigned to the case. *Mickens v. Greene,* 74 F.Supp.2d at 612-13. We conclude that the district court's findings are largely factual and are not clearly erroneous. Because we agree with the district court that many of Mickens' assertions of adverse effect were not viable defense strategies and that any viable defense strategies were not linked to his attorney's conflict of interest, we reject Mickens' Sixth Amendment challenge to his conviction based on the theory that the claimed conflict had an adverse effect on the representation of his attorney.

IV.

[19] Mickens' other allegations of error are easily addressed. Mickens argues that the district court erred in rejecting his claims for ineffective assistance of counsel. Mickens offers two grounds upon which his representation may be found ineffective under *Strickland:* his trial counsels' inadequate pretrial investigation and failure of his trial counsel to request a psychiatric evaluation for the resentencing. The first of these claims is that counsel were ineffective because they failed to investigate or to request an investigator for the ***363** purpose of gathering evidence for a consent defense and for use in mitigation at sentencing. The district court held that Mickens' claims of inadequate investigation were defaulted because he had not fairly presented them to the Virginia courts. See *Matthews v. Evatt,* 105 F.3d 907, 911 (4th Cir.1997). We agree with the district court. See *Mickens v. Greene,* 74 F.Supp.2d at 598.

[20] Mickens' second ineffective assistance claim focuses on his counsels' failure to retain a mental health expert to evaluate him for the resentencing. The district court rejected this argument on the merits, it appearing that Mickens had been examined by a psychiatrist on the motion of Saunders. On appeal, Mickens has not established what new information a mental health expert would have discovered beyond what counsel already knew at the time of the resentencing. Moreover, this claim was adjudicated against Mickens on the merits in state court. See *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (ruling that 28 U.S.C. § 2254(d)(1) prohibits federal court from granting habeas corpus relief with respect to claim adjudicated on the merits in state court unless the resulting decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court). We also reject this claim.

Mickens also challenges the sufficiency of the evidence supporting his conviction for attempted forcible sodomy. He further contends that absent sufficient proof of the predicate offense of forcible sodomy his capital murder conviction under Va.Code Ann. § 18.2-31(5) cannot stand. The district court concluded that this claim was defaulted because it was not fairly presented to the state courts. See *Matthews,* 105 F.3d at 911. Again, we agree with the district court. See *Mickens v. Greene,* 74 F.Supp.2d at 597.

[21] In his reply brief Mickens raises the argument that the ineffective assistance of his state habeas counsel excuses the default of additional ineffective assistance of counsel claims raised for the first time in his federal habeas petition. We have held that ineffective assistance by state habeas counsel fails to establish cause. See *Mackall v. Angelone,* 131 F.3d 442, 449 (4th Cir.1997) (en banc) ("Because [petitioner] has no right to effective assistance of counsel in his state habeas proceedings, he cannot demonstrate cause to excuse the procedural default of his claims that his trial and appellate counsel were constitutionally ineffective."). The district court held Mickens' additional claims defaulted on this ground. We adopt the district court's analysis on this issue. See *Mickens v. Greene,* 74 F.Supp.2d at 595.

V.

[22] In summary, "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance *necessary to justify reliance on the outcome of the proceeding.*" *Strickland,* 466 U.S. at 691-92, 104 S.Ct. 2052 (emphasis added). The Sixth Amendment guarantee of counsel does not guarantee an ideal or perfect representation. Thus, *Sullivan* requires a petitioner challenging his conviction on conflict of interest grounds to establish that his attorney's conflict of interest adversely affected his lawyer's performance. The

Supreme Court's decision in *Wood* does not relieve a petitioner of this burden, even when the trial court has failed to inquire into a potential conflict about which it reasonably should have been aware. Subsequent to *Wood*, the *Strickland* Court considered the arguments with respect to a rule of prejudice in conflict of interest cases but explicitly rejected a *per se* rule and found the rule to be "an actual conflict of interest adversely affected his lawyer's performance." *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052. We reject the automatic reversal rule and conclude that Mickens must establish an adverse effect arising from his attorney's conflict of interest. ***364** We deny the other arguments of Mickens for the reasons stated above, and we deny his petition for habeas corpus relief.

Accordingly, the judgment of the district court is

AFFIRMED. [FN7]

FN7. The theme of the dissent is candid and is repeated in various forms and wordings from time to time. At first appearance, at p. 364, it is

When a trial judge ignores an apparent conflict, a defendant need *only* show that his lawyer labored under an actual conflict to establish a Sixth Amendment claim. The defendant is *not required* to show that the actual conflict adversely affected his lawyer's performance. (Italics added.)

While the theory is laudable, it searches for a perfect trial rather than a fair trial. It would plainly require a new trial although there is no adverse effect on the attorney's performance. So, even a defense as brilliant as that of Erskine would be impossible to justify if a technical conflict existed which had no effect on the performance. We do not believe that this is the law, and are of opinion that a technical conflict, as here, which had no effect on the performance of the attorney, is not such a structural error that vacation of a conviction by way of habeas corpus is called for.

MICHAEL, Circuit Judge, dissenting:

The lawyer appointed to defend Walter Mickens on a capital murder charge in Virginia had been representing the murder victim on criminal charges at the time of his death. The state judge who made the appointment was involved in both cases and knew or should have known of the apparent conflict. No one told Mickens about the conflict problem, so he could not object. Once the back-to- back representation came to light after Mickens had been sentenced to death, the apparent conflict proved to have been a real one. None of this poses a problem, according to the majority, because the lawyer did a passable job in defending Mickens. I respectfully dissent because there is a serious Sixth Amendment violation. A trial judge has a constitutional duty to look into an apparent conflict, even if there is no objection. *See Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). When a trial judge ignores an apparent conflict, a defendant need only show that his lawyer labored under an actual conflict to establish a Sixth Amendment claim. The defendant is not required to show that the actual conflict adversely affected his lawyer's performance. Here, the judge who appointed the lawyer for Mickens ignored the apparent conflict; and, as it turns out, the lawyer was actually saddled with a genuine conflict while he represented Mickens. Mickens's Sixth Amendment right to conflict-free counsel was therefore violated, and he is entitled to a new trial.

I.

On March 20, 1992, Bryan Saunders was appointed to represent Timothy Hall on assault and concealed weapon charges pending in Newport News, Virginia. (It was Hall's mother who had accused him of assaulting her.) Hall met promptly with Saunders, and they discussed the circumstances surrounding each of the charged crimes. Within a matter of days, on March 30, 1992, Hall's nude body was found near the James River, and foul play was evident. The gruesome nature of the crime against Hall was prominently reported by the news media. On April 3, 1992, state judge Aundria Foster dismissed the charges against Hall on account of his murder. Judge Foster's handwritten order of dismissal was entered on a single-page docket sheet that identified Saunders as Hall's lawyer. The next business day Judge Foster appointed Saunders to represent Mickens, who had been charged in Hall's murder. Despite the fact that Saunders was representing Hall on criminal charges at the time of his death, Judge Foster did not make any inquiry into whether Saunders would have a conflict in representing Mickens. As the district court concluded, Judge Foster knew, or should have known of the "apparent possible conflict." *Mickens v. Greene*, 74 F.Supp.2d 586, 613-15 (E.D.Va.1999).

***365** Because Saunders's loyalty was subject to question when he was appointed to represent Mickens, Saunders himself had the duty to inform Mickens of his prior representation of Hall and to give Mickens the opportunity to decline his services. *See* Va.Code Prof'l Responsibility DR 5-105(A) (Michie 1992). Saunders, however, said nothing to Mickens, or to the court for that matter. Saunders went on to represent Mickens at the guilt phase of his murder trial and at sentencing. Although Saunders was assisted by court-appointed co- counsel, Saunders was responsible for about ninety percent of the workload. Saunders never disclosed to his co-counsel that he had represented Hall. Several years after Mickens had been sentenced to death, Mickens's federal habeas counsel stumbled onto the fact that Saunders was representing the murder victim (Hall) at the time of the offense. That is the only reason we have this case today.

II.

The Sixth Amendment guarantees a defendant in a criminal case the right to effective assistance of counsel, and this includes the right to a lawyer who is free of conflicts of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 345- 50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Trial judges have a special duty to enforce the right to conflict-free counsel. *See generally Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (emphasizing that " '[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused' ") (quoting *Glasser v. United States*, 315 U.S. 60, 71, 62 S.Ct. 457, 86 L.Ed. 680 (1942)). A series of three Supreme Court cases have clarified the duty of trial judges in policing conflict situations and have established what a defendant must show to obtain a new trial when the judge has ignored an apparent conflict.

In *Holloway* a public defender representing three defendants in a robbery and rape case moved on conflict grounds to have separate counsel appointed before the trial began. The trial judge "failed to take adequate steps" to explore the risks of a conflict and denied the motion. *Holloway*, 435 U.S. at 487, 98 S.Ct. 1173. The Court held that when a trial judge fails to inquire in such a circumstance, prejudice to the accused is presumed, and automatic reversal is

warranted. In other words, the defendants were not required to show that their lawyer labored under an actual conflict of interest or that an actual conflict adversely affected his performance. *See id.* at 488-89, 98 S.Ct. 1173. The *Holloway* Court explicitly left open the question of whether (or under what circumstances) the Sixth Amendment imposes an *independent* duty on a trial judge to inquire into a potential conflict when there is no objection or motion. *See id.* at 483-84, 98 S.Ct. 1173.

Holloway was followed by *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), where two privately retained lawyers represented three defendants who were accused of the same murders but tried separately. In *Sullivan* the only defendant to be convicted claimed that his right to conflict-free counsel had been violated even though there was no timely objection to the multiple representation. The Court said that the defendant's claim raised the issue "expressly reserved in *Holloway v. Arkansas,*" that is, "whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection." *Sullivan,* 446 U.S. at 345, 100 S.Ct. 1708. The Supreme Court held that "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347, 100 S.Ct. 1708. In other words, a trial judge has a constitutional duty to inquire when a conflict is sufficiently apparent. Because the situation in *Sullivan* did not suggest that the trial judge should have reasonably known about any conflict, the judge was under no affirmative duty to inquire. *See id.* For that *366 particular situation--when the trial judge has no duty to inquire--the Court in *Sullivan* announced the defendant's burden for establishing a Sixth Amendment violation: he "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348, 100 S.Ct. 1708. *Sullivan,* however, did not articulate the defendant's burden when a trial court has a duty to inquire, but fails to fulfill it.

Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), answered the question left open in *Sullivan:* more specifically, what must a defendant demonstrate when he did not raise the conflict issue at trial, but the situation nevertheless triggered the judge's duty to inquire and the judge did nothing. In *Wood* two individual defendants in an obscenity case had been represented by a lawyer hired by their employer, and the record suggested that the employer might have been more interested in pressing broader legal principles than in seeking lenient treatment for its employees. *See id.* at 268, 272-74, 101 S.Ct. 1097. There was no objection to the representation, but the trial judge was faced with an "apparent" conflict, one that was clearly suggested by the circumstances. *See id.* at 262, 101 S.Ct. 1097. Because there was an apparent conflict, *Wood* held that the judge had a constitutional duty to inquire, despite the absence of an objection. *See id.* at 272-74, 101 S.Ct. 1097. This is consistent with *Sullivan,* which requires a trial court to "initiate an inquiry" when it "knows or reasonably should know that a particular conflict exists." *Sullivan,* 446 U.S. at 347, 100 S.Ct. 1708. In *Wood* the trial court's failure to fulfill its constitutional duty to inquire carried the following consequence, according to the Supreme Court:

> [The state] court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.

Wood, 450 U.S. at 273-74, 101 S.Ct. 1097. Simply put, the petitioners were only required to show an actual conflict. They were not required to show that the actual conflict adversely affected their lawyer's performance.

Holloway, Sullivan, and *Wood* deal with three separate circumstances in which conflict of interest claims arise under the Sixth Amendment. The first is when a defendant objects to his representation on the basis of a conflict and the trial judge fails to inquire into the merits of the objection. In this situation, the defendant is entitled to automatic reversal and a new trial. *See Holloway,* 435 U.S. at 488-89, 98 S.Ct. 1173. The second circumstance is when there is no objection to the representation, but the judge knew or reasonably should have known about an apparent conflict. If the judge fails to inquire in this situation, the defendant is only required to show that his lawyer labored under an actual conflict. *See Wood,* 450 U.S. at 273-74, 101 S.Ct. 1097. The third circumstance is when there is no objection, and the conflict is not apparent to the judge. In that case, the defendant must show that his lawyer labored under an actual conflict and that the conflict adversely affected his lawyer's performance. *See Sullivan,* 446 U.S. at 348, 100 S.Ct. 1708.

The majority's critical mistake is overlooking the careful distinction the Supreme Court made in *Sullivan* between the second and third situations. The distinction turns on whether the trial court faces an apparent conflict. The majority ignores this distinction and concludes that unless there is an objection--no matter how obvious the conflict might appear to the trial judge-- the defendant must still demonstrate both actual conflict and adverse effect *367 when the judge has failed in his constitutional duty to inquire.

The majority's mistake begins with its treatment of *Sullivan.* The Supreme Court in *Sullivan* held that whether or not there is an objection, a trial court has a duty to inquire into an apparent conflict. The Court was clear: "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347, 100 S.Ct. 1708. The majority erroneously concludes that this statement is nothing more than a recitation of the *Holloway* holding, that is, a trial court must inquire into a conflict when there is an objection. *See ante* at 357-58. I respectfully suggest that the majority's reading is wrong for several reasons. First, if *Sullivan* was simply echoing *Holloway,* surely the Court would have cited *Holloway.* Instead, the Court cited to *Foxworth v. Wainwright,* 516 F.2d 1072, 1076-77 (5th Cir.1975), and *United States v. Medel,* 592 F.2d 1305, 1312-13 (5th Cir.1979), both of which stand for the principle that when a conflict is sufficiently apparent, a trial judge has a constitutional duty to inquire, even if there is no objection. [FN*] Second, the Court in *Sullivan* pointed out that the defendant's claim raised the issue "expressly reserved in *Holloway v. Arkansas,*" specifically, "whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection." *Sullivan,* 446 U.S. at 345, 100 S.Ct. 1708. The Court, therefore, was careful to explain that the defendant's claim raised an undecided issue: whether the trial court has any Sixth Amendment duty to inquire into a conflict situation when there is no objection. The Court decided this issue by declaring that a trial court "must initiate an inquiry" when it "knows or reasonably should know that a particular conflict exists." *Id.* at 347, 100 S.Ct. 1708. This statement was not a simple recitation of *Holloway's* holding, but rather a new constitutional rule. Third, the Court's actual analysis of whether "the trial court [knew] or reasonably should [have

known]" that a conflict existed shows that the Court was going beyond *Holloway*, where the presence of an objection dictated the outcome. The *Sullivan* Court, in deciding that the trial judge was under no duty to inquire, noted that there was no objection to the representation *and* that the defense strategy did not suggest a conflict. *See Sullivan*, 446 U.S. at 347, 100 S.Ct. 1708. If the defendant's Sixth Amendment claim had been only a *Holloway* claim, the lack of an objection would have (by itself) defeated the claim. There would have been no reason for the Court to explain that the defense strategy did not suggest the presence of any conflict. Fourth, the majority's reading of *Sullivan* is contrary to the plain language of the holding in the case. The Supreme Court said that a trial court has a duty to inquire if it "should have known" about a conflict. This means that the trial court's duty to inquire is not limited to situations where there is an actual objection. Accordingly, it is clear that *Sullivan* held that in the absence of an objection, a trial judge still has a duty to inquire if the conflict is sufficiently apparent.

FN* In *Foxworth* the Fifth Circuit vacated a conviction because the trial court failed to inquire into an apparent conflict, even though the record did not reflect an objection. *See* 516 F.2d at 1080 n. 17. Significantly, in these circumstances, the court held that a defendant need only show an actual conflict and need not show adverse effect. *See id.* at 1077 n. 7.
In *Medel* the Fifth Circuit said, "We ... reject [the defendants'] contention that the trial court was under an affirmative duty to inquire into the possibility of a conflict of interest. Defense counsel ... never indicated to the trial court that a conflict might exist. *Nor do we find anything in the record that should have alerted the Court to such a possibility.*" 592 F.2d at 1312-13 (emphasis added).

In light of *Sullivan* the majority's analysis fails as a matter of logic. The majority holds that in every case where there was no objection, the convicted defendant (in *368 order to obtain relief) must show actual conflict and adverse effect, regardless of whether there was an apparent conflict when the case was tried. Under the majority's rule, it makes no difference whether the trial judge had a constitutional duty to inquire because the defendant must always prove the same two conditions. *Sullivan*, however, dictates that there is a distinction between cases in which the trial judge has a duty to inquire and those in which he does not. As a result, it is simply wrong to hold every defendant to the same burden regardless of whether the trial court was under a duty to investigate an apparent conflict. *Wood v. Georgia* makes that clear.

This brings me to the majority's next critical mistake, its treatment of *Wood v. Georgia*. The plain language of *Wood* provides that when a trial court fails to fulfill its constitutional duty to inquire and there was no objection, a defendant is only required to establish an actual conflict. *Wood*, 450 U.S. at 273-74, 101 S.Ct. 1097. The majority does not deny that *Wood*'s remand instructions say as much. The majority, however, advances two reasons why we should not take *Wood* literally, but neither reason is persuasive. First, the majority says that to dispense with a showing of adverse effect, we must read *Wood* to have overruled *Sullivan* by implication. The majority then cites the canon that "overruling by implication is not favored." *Ante* at 359 (citing *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334, 1347 (4th Cir.1992)). However, as shown above, *Wood* did not overrule *Sullivan* in any way. Rather, *Wood* simply answered the question left open in *Sullivan*. As a result, the cited canon has no relevance to this case. Second, the majority claims that *Wood*'s reference to "actual conflict" in its holding is mere "shorthand" for requiring both actual conflict and adverse effect. *Ante* at 360. The majority arrives at this conclusion because the *Wood* Court, in discussing the facts of the case, questioned whether the lawyer's performance ("his basic strategic decisions") were influenced by a conflict. *See ante* at 360 (quoting *Wood*, 450 U.S. at 272, 101 S.Ct. 1097). The majority concludes that if only an actual conflict was required, the Court would not have made any reference to whether the lawyer's work had been affected. However, the fact that a lawyer's performance was affected can be evidence of an actual conflict. Of course, a defendant can establish that his lawyer labored under an actual conflict without showing a detrimental effect on the representation. Nevertheless, the fact that a lawyer fell down in his performance may be a strong indication that he did labor under an actual conflict. *See United States v. Tatum*, 943 F.2d 370, 375 (4th Cir.1991) ("The two requirements, an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap."). Therefore, it is not surprising that the *Wood* Court mentioned the quality of performance, even though the holding only required a showing that the lawyer labored under an actual conflict.

The final mistake the majority makes is not acknowledging the importance of *Sullivan* and *Wood* to our system of justice. Again, the Supreme Court distinguishes between the situation where the trial judge ignores an obvious conflict and the situation where the conflict is not apparent. This distinction takes into account the broader harm caused if a judge conducts a trial while ignoring an apparent conflict. Allowing a judge to ignore a conflict "invites disrespect for the integrity of the court," *Wheat v. United States*, 486 U.S. 153, 162, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (internal quotations marks omitted), and "result[s] in the erosion of public confidence in the integrity of the bar and of the legal system." *United States v. Collins*, 920 F.2d 619, 627 (10th Cir.1990) (internal quotation marks omitted). Courts in our country "have an independent interest in ensuring that criminal trials are conducted within the ethical *369 standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 160, 108 S.Ct. 1692. These concerns require us to treat a defendant's claim that a judge ignored an apparent conflict differently from other conflict of interest claims. The majority, however, treats all conflict claims the same, unless there is an objection. Under the majority's approach a defendant can be required to take a lawyer with divided loyalties so long as he does a tolerable job, and the defendant does not lodge a timely objection. The Sixth Amendment requires more. A criminal defendant has the right *from the outset of proceedings* to a lawyer who is free of conflicts. Yet the majority would impose no added consequence when a trial judge knowingly allows an unwitting defendant to proceed with a lawyer who has an apparent conflict. In this situation, the majority holds, the defendant's burden is the same as when the conflict is not known to the court until after a guilty verdict. In both cases, the defendant must show both an actual conflict and adverse effect, according to the majority. But under *Sullivan* and *Wood*, when the conflict is obvious and the trial judge ignores his duty (and opportunity) to see that the Sixth Amendment right is protected, the Supreme Court lessens the defendant's burden. He need only show that his lawyer had an actual conflict. This lower burden on defendants encourages trial courts to pay strict attention to fundamental rights, and it confirms that our system is dedicated

to ensuring fairness. The majority opinion, which goes against the decisions of the Supreme Court, does nothing to encourage trial courts to take the initiative in policing obvious conflicts of interest. That is unfortunate.

III.

The state judge faced (or actually created) an apparent conflict when she appointed Bryan Saunders to represent Walter Mickens in his capital murder case. The judge should have investigated the conflict problem at once and resolved it before it was too late. Instead, Mickens was put on trial and sentenced to death with a lawyer who labored under an actual conflict of interest. *See Mickens v. Taylor*, 227 F.3d 203, 213-17 (4th Cir.2000), *vacated & reh'g granted*, Oct. 23, 2000 (explaining why Mickens's lawyer had an actual conflict). Mickens must answer to the charge of capital murder, but he should answer through a lawyer whose representation is not clouded by a conflict. Because Mickens's Sixth Amendment right to conflict-free counsel was violated, I would award him a writ of habeas corpus unless the Commonwealth of Virginia grants him a new trial.

I respectfully dissent, and Judge Motz and Judge King join with me.

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(Cite as: 227 F.3d 203)
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United States Court of Appeals,
Fourth Circuit.

Walter MICKENS, Jr., Petitioner-Appellant,
v.
John B. TAYLOR, Warden, Sussex I State Prison, Respondent-Appellee.

No. 00-4.

Argued: June 6, 2000
Decided: Sept. 14, 2000
Rehearing En Banc Granted; Opinion Vacated Oct. 23, 2000.

Following affirmance of capital murder conviction and death sentence, 478 S.E.2d 302, petition for writ of habeas corpus was filed. The United States District Court for the Eastern District of Virginia, Robert E. Payne, J., 74 F.Supp.2d 586, denied petition, and petitioner appealed. The Court of Appeals, Michael, Circuit Judge, held that: (1) petitioner established cause excusing his failure to raise conflict of interest claim in state habeas proceedings; (2) trial judge knew or should have known about trial counsel's conflict of interest and, thus, had duty to inquire; (3) petitioner did not waive his right to conflict-free counsel; (4) counsel labored under actual conflict of interest; (5) certain claims of petitioner were procedurally defaulted; and (6) defense counsel's failure to obtain mental health expert to perform evaluation did not amount to ineffective assistance of counsel.

Reversed.

Widener, Circuit Judge, filed dissenting opinion.

***205 ARGUED:** Robert James Wagner, Wagner & Wagner, Richmond, Virginia, for Appellant. Robert Quentin Harris, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellee. **ON BRIEF:** Robert E. Lee, Jr., Virginia Capital Representation Resource Center, Richmond, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellee.

Before WIDENER, MICHAEL, and MOTZ, Circuit Judges.

Reversed by published opinion. Judge MICHAEL wrote the majority opinion, in which Judge DIANA GRIBBON MOTZ joined. Judge WIDENER wrote a dissenting opinion.

OPINION

MICHAEL, Circuit Judge:

In 1993 a jury in Virginia state court convicted Walter Mickens of capital murder, and he was sentenced to death. Mickens' federal habeas counsel discovered something by chance that Mickens did not know: Mickens' lead counsel in his murder case was representing the murder victim on criminal charges at the time of the victim's death. The state judge who appointed counsel for Mickens knew or should have known that the back-to-back representation presented an apparent conflict, but the judge failed to inquire. This looks bad, but there is more. Mickens' lead counsel had an actual conflict of interest as a result of his representation of the murder victim. These circumstances, taken ***206** together, require that Mickens be afforded a new trial under the authority of *Wood v. Georgia*, 450 U.S.

261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). We therefore reverse the district court's judgment denying Mickens a writ of habeas corpus. The district court will award the writ on remand unless the Commonwealth of Virginia gives Mickens a new trial.

I.

We take the facts about the crime from the Supreme Court of Virginia, *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994). *See* 28 U.S.C. § 2254(e)(1). On March 28, 1992, Timothy Hall, age seventeen, was living with his fourteen-year-old friend, Raheem Gordon, and Gordon's father in an apartment at 28th and Washington Streets in Newport News, Virginia. Between 7:00 and 8:00 p.m. that evening, Hall gave young Gordon a ride to the nearby Towers apartment building, where Gordon attended a party. Hall had intended to go to the same party later, but he never appeared. One item about Hall's dress that evening becomes important later: he was wearing a pair of Gordon's Nike brand "Cross Trainer" athletic shoes. At about 8:00 p.m. Vincent West and Bruce Mitchell, who were attending the Towers party, left and went to a nearby convenience store. After buying a few items and leaving the store, West and Mitchell went to a park next to the Towers building. While sitting in the park, West and Mitchell saw a man with a bicycle hiding in some bushes and looking at them. The man was later identified as the petitioner, Walter Mickens. Less than forty hours later, at about 12:30 p.m. on March 30, 1992, Chris Basford was walking along the James River in Newport News when he saw a body lying face down on a mattress beneath an abandoned construction company building. The body's legs were spread apart, and it was nude from the waist down, except for socks. The body was identified as that of Timothy Hall. Pubic hairs were recovered from the buttocks of Hall's body. There were bloody "transfer" stains on the outsides of his thighs, and there was a white liquid substance close to his anus. The autopsy by the medical examiner revealed that Hall had been subjected to 143 separate "sharp force injuries." The examiner concluded that Hall had bled to death and that twenty-five of the wounds were fatal. The examiner opined that the fatal wounds may not have caused instant death and that Hall could have lived as long as thirty to forty minutes after infliction of the last wound.

On the evening of April 4, 1992 (five days after Hall's body was found), the Newport News police, Officer D.A. Seals and Detective Dallas Mitchell, responded to a complaint that an African-American male, who was riding a bicycle, had assaulted a juvenile. Seals and Mitchell soon found Mickens riding a bicycle in the parking area at the abandoned construction company building. When Seals displayed his badge and approached Mickens, Mickens fled on his bicycle. He did not get far. Seals and Mitchell tracked Mickens down as he was being detained by other officers. Mickens was arrested at 7:00 p.m. on the charges involving the juvenile. After Mickens was given his Miranda warnings, he agreed to talk. Without telling Mickens how Hall had been murdered, Detective Mitchell told Mickens that he knew Mickens had killed Hall. Mickens denied any involvement in Hall's murder, but said, "You didn't find any knife on me, did you?" The following morning, the police obtained warrants charging Mickens with the murder and attempted sodomy of Hall. When Detective Seals handed Mickens the warrants, Mickens said, "I accept the warrants, I accept the charges." Seals asked Mickens what he meant by that, and Mickens responded, "Mother f___r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael

Jacobs wearing the Nike brand ***207** "Cross Trainer" shoes that Hall had been wearing when Raheem Gordon had last seen Hall alive. Jacobs testified that he had bought the shoes from Mickens for $5.00 the previous week (the week Hall's body was found).

The Commonwealth offered the following evidence through expert witnesses. The pubic hairs removed from Hall's buttocks were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens, who is African-American. Tissue was attached at the roots of the hairs, indicating that the hairs had been forcibly removed, possibly by the rubbing of genitals against Hall's buttocks. The stain on the mattress cover was of human sperm. DNA analysis (RFLP type) revealed that Hall could not have produced the sperm. Mickens' DNA pattern matched the DNA pattern in the sperm, however. The approximate percentages of the population that could have deposited the sperm were one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics.

On March 26, 1993, about a year after Hall's murder, Mickens was in a holding cell at the courthouse with a man named Tyrone Brister. Brister testified about his encounter with Mickens. Brister asked Mickens why he was there, and Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

The jury found Mickens guilty of the capital murder of Hall, specifically, murder during the commission of, or following, an attempted forcible sodomy. Mickens was sentenced to death, and the Supreme Court of Virginia affirmed. *See Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994). The United States Supreme Court granted his first petition for certiorari and remanded the case "for further consideration in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)." *Mickens v. Virginia*, 513 U.S. 922, 115 S.Ct. 307, 130 L.Ed.2d 271 (1994). On remand the Supreme Court of Virginia concluded that *Simmons* mandated a resentencing because "the jury was entitled to be informed of Mickens' parole ineligibility." *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9, 10 (1995). On February 5-8, 1996, the trial court held a new sentencing hearing. The jury again fixed Mickens' sentence at death. Mickens appealed, the Supreme Court of Virginia affirmed the sentence, *see Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302, 307 (1996), and the Supreme Court denied certiorari, *see Mickens v. Virginia*, 520 U.S. 1269, 117 S.Ct. 2442, 138 L.Ed.2d 202 (1997). Mickens then pursued state post-conviction relief. The Supreme Court of Virginia summarily denied his petition for a writ of habeas corpus on December 15, 1997. Mickens then sought federal habeas corpus relief with the assistance of counsel appointed by the district court.

It was Mickens' federal habeas counsel who first discovered that Mickens' lead trial counsel, Bryan Saunders, labored under a conflict of interest. (The facts about the conflict issue are taken from the findings of the district court in Mickens' federal habeas proceeding.) While investigating Mickens' case, federal habeas counsel went to the Newport News Juvenile and Domestic Relations Court (JDR Court) to review Mickens' JDR file. While there, counsel also asked the clerk on duty for any files involving Timothy Hall. Although juvenile

case files are confidential and are not to be disclosed publicly without a court order, *see* Va.Code Ann. § 16.1-305, the clerk slipped up and produced Hall's file. This file revealed that at the time of Hall's death, Saunders was representing him on assault and concealed weapon charges. The first of these charges originated on February 21, 1992, when Hall's mother swore out a warrant ***208** for assault and battery against him. She said that her son had grabbed her by the arms and shoved her to the ground. Hall was booked again around March 13, 1992, when the Newport News police charged him with possession of a concealed weapon (a serrated bread knife wrapped in paper). Hall appeared before the JDR Court on March 20, 1992, when Judge Paul Criver, Jr. appointed Saunders to represent Hall on the two charges. A hearing in the matter was continued to April 3, 1992. Sometime between March 20 and March 28, 1992 (the day Hall was last seen alive), Hall came to Saunders' office for an interview that lasted between fifteen and thirty minutes. They discussed the circumstances surrounding each of the charged crimes.

On Friday, April 3, 1992, four days after Hall's body was discovered, Judge Aundria Foster of the JDR Court dismissed the assault and concealed weapon charges against Hall, noting that he was deceased. Judge Foster's handwritten order was entered on the individual docket sheet for Hall's case. The docket sheet was a single page that included Hall's full name, his date of birth, the charges, an abbreviated history of the proceedings, and the identity of his appointed lawyer, Saunders. That same day Saunders went to the courthouse for the scheduled hearing in Hall's case, and someone (Saunders does not recall whom) told him that Hall was dead and that the case had been dismissed. Mickens was arrested the next day, Saturday, April 4, 1992. On the following Monday, April 6, 1992, Judge Foster--the same judge who handled the dismissal of Hall's case--appointed Saunders to represent Mickens in his trial for the capital murder of Hall. Mickens' arrest warrants, which appear to have been before Judge Foster when she appointed Saunders, charged that "on or about March 30, 1992" Mickens murdered "Timothy Jason Hall, white male, age 17, by stabbing, and during the commission of an abduction, and sodomy as well as robbery." *Mickens v. Greene,* 74 F.Supp.2d 586, 614 (E.D.Va.1999). Judge Foster did not make any inquiry into whether Saunders would have a conflict in representing Mickens.

Following his appointment, Saunders represented Mickens at the guilt phase of his murder trial and at both of his sentencings. Saunders worked with court- appointed co-counsel, Warren Keeling, but Saunders was responsible for about ninety percent of the workload. Keeling did take the lead at the sentencings. Neither Saunders nor Keeling represented Mickens on his state habeas petition. Saunders never told Mickens (or Keeling) that he had represented Hall, and Mickens did not learn about it until federal habeas counsel saw Hall's JDR file.

On June 25, 1998, Mickens filed a petition in federal court for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied the petition. That court rejected the conflict of interest claim after concluding that "the possible conflict of interest presented by Saunders' successive representation of Hall and Mickens never ripened into an actual conflict nor was Saunders' advocacy impaired thereby." *Mickens,* 74 F.Supp.2d at 615. The district court also rejected Mickens' other claims, including those for ineffective assistance of counsel and insufficiency of evidence. Mickens raises several issues on appeal, but he devotes most of his attention to the question of Saunders' conflict of interest.

Because Mickens filed his federal habeas petition after the April 24, 1996, enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, we apply 28 U.S.C. § 2254 as amended by AEDPA. *See Mueller v. Angelone,* 181 F.3d 557, 565-72 (4th Cir.), *cert. denied,* 527 U.S. 1065, 120 S.Ct. 37, 144 L.Ed.2d 839 (1999). We now turn to the issues.

II.

[1][2][3] The Sixth Amendment guarantees a defendant in a criminal case the ***209** right to effective assistance of counsel, which includes the right to representation that is free of conflicts of interest. *See Cuyler v. Sullivan,* 446 U.S. 335, 345-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Mickens argues that either of the following two circumstances mandates an award of the writ on conflict grounds: (1) the state court failed to inquire into Saunders' conflict of interest when it knew or should have known that a conflict existed, and (2) Saunders labored under an actual conflict of interest that adversely affected his representation. Conflicts claims present "mixed questions of law and fact that we review *de novo.*" *See Williams v. French,* 146 F.3d 203, 212 (4th Cir.1998) (citing *Sullivan,* 446 U.S. at 342, 100 S.Ct. 1708), *cert. denied,* 525 U.S. 1155, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999). Of course, the district court's underlying factual findings "are subject to the clearly erroneous standard set forth in Rule 52(a), Fed.R.Civ.P." *Fields v. Attorney General,* 956 F.2d 1290, 1297 n. 18 (4th Cir.1992).

A.

[4][5] Before we examine the merits of Mickens' conflicts claim, we address the Commonwealth's argument that this claim is barred under the requirement for exhaustion and the doctrine of procedural default. The exhaustion doctrine bars a claim if it is raised for the first time in a federal habeas petition. *See Breard v. Pruett,* 134 F.3d 615, 619 (4th Cir.) (citing *Matthews v. Evatt,* 105 F.3d 907, 911 (4th Cir.1997)), *cert. denied,* 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998). The procedural default doctrine bars a claim when the habeas petitioner "fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.' " *Id.* (quoting *Coleman v. Thompson,* 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).

[6][7][8] A petitioner may overcome both the exhaustion and procedural default bars by showing cause and actual prejudice. *See Breard,* 134 F.3d at 620. A petitioner can establish cause by showing "that the factual basis for [the] claim was unavailable to him at the time he filed his state habeas petition." *Id. See also McCleskey v. Zant,* 499 U.S. 467, 493-94, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Williams,* 146 F.3d at 209. The district court concluded that Mickens established cause: "Here, Saunders' silence and state law requirements for secrecy of juvenile court records operated together to preclude Mickens from raising the conflict of interest claims in his state habeas petition." *Mickens,* 74 F.Supp.2d at 600. Juvenile files are confidential and may not be produced without court order. *See* Va.Code Ann. § 16.1-305. The Commonwealth nevertheless argues that if federal habeas counsel was able to discover the facts behind the conflicts claim, then Mickens could have done the same thing when he was developing his claims on state habeas. We disagree. As the district court found, "the fortuitous circumstances by which federal habeas counsel discovered the truth about Saunders' conflict prove beyond question that Mickens did not fail in his duty to inquire in the state

court proceedings." *Mickens*, 74 F.Supp.2d at 601 (citing *Amadeo v. Zant*, 486 U.S. 214, 224, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988)). It was only through a clerk's mistake that federal habeas counsel saw Hall's JDR file, and as soon as a supervisor discovered the error, the file was taken from federal habeas counsel. Under these circumstances, we agree with the district court that "the factual predicate for [the conflicts claim] was not available to Mickens in state court nor was it discoverable through the exercise of diligent investigation." *Mickens*, 74 F.Supp.2d at 602. Mickens has established cause.

[9][10] To establish prejudice to excuse his default, a petitioner must show that his counsel's error "worked to his actual and ***210** substantial disadvantage," not merely that the error "created a possibility of prejudice." *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (emphasis omitted). In conflict of interest cases prejudice is presumed once a petitioner establishes the merits of the underlying claim. *See Sullivan*, 446 U.S. at 349-50, 100 S.Ct. 1708; *Wood v. Georgia*, 450 U.S. 261, 273-74, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). Our prejudice inquiry in this case thus incorporates the test for establishing the underlying conflict of interest claim. *See Williams*, 146 F.3d at 212-13 (analyzing actual prejudice by examining the merits of petitioner's conflict of interest claim); *Rosenwald v. United States*, 898 F.2d 585, 587 (7th Cir.1990) (concluding that to show actual prejudice the petitioner must establish the merits of his *Sullivan* claim). This means that we proceed directly to the merits of Mickens' conflict of interest claim.

B.

[11][12][13] Mickens' first conflict argument is that he must be retried for the following reason: the state judge who appointed Saunders to represent him on the capital murder charge conducted no inquiry even though the judge knew or should have known that Saunders' back-to-back representation of the murder victim and the accused would present a conflict. As a general rule, to establish ineffective assistance of counsel, a petitioner must show (1) objectively unreasonable performance and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A different test applies when there is a conflict of interest claim: "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348, 100 S.Ct. 1708. As we have said, "[w]hen counsel for a defendant in a criminal case has an actual conflict of interest ... and the conflict adversely affects counsel's performance in the defense of the defendant, prejudice to the defense is presumed and a new trial must be ordered." *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir.1991) (citing *Sullivan*, 446 U.S. at 348- 50, 100 S.Ct. 1708).

[14] There is a circumstance where a showing of adverse effect is not required, according to *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). We have described that circumstance as follows: "In *Wood v. Georgia*, the Court flatly stated that a *conflict situation* which is not addressed by the trial court requires reversal ... 'when the trial court has failed to make an inquiry even though it knows or reasonably should know that a particular conflict exists.' " *Tatum*, 943 F.2d at 379 (emphasis added, internal citation omitted) (quoting *Wood*, 450 U.S. at 272 n. 18, 101 S.Ct. 1097 (internal quotation marks omitted)). The Supreme Court decided *Wood* on conflict of interest

grounds even though neither party had raised the conflict issue. *See Wood*, 450 U.S. at 265 n. 4, 101 S.Ct. 1097. The Court concluded that "the record ... demonstrate[d] that the *possibility* of a conflict of interest was sufficiently apparent at the time of the [probation] revocation hearing to impose upon the [state] court a duty to inquire further." *Id.* at 272, 101 S.Ct. 1097. However, the Supreme Court could not "determine whether an actual conflict of interest was present, especially without the benefit of briefing and argument." *Id.* Accordingly, the Court ordered that the case be returned to the state trial court for "a hearing to determine whether the conflict of interest that th[e] record strongly suggest [ed] actually existed at the time of the probation revocation or earlier." *Id.* at 273, 101 S.Ct. 1097. Significantly, the *Wood* Court only asked the state court to determine whether there was an actual conflict; it did not require an additional finding of adverse effect. The Supreme Court specifically instructed the state court that if it found "an actual conflict of ***211** interest" and "no valid waiver of the right to independent counsel," "it must hold a new ... hearing that is untainted by a legal representative serving conflicting interests." *Id.* at 273-74, 101 S.Ct. 1097. Accordingly, to prevail under *Wood* a petitioner must establish that (1) the trial court failed to inquire even though it knew or reasonably should have known about an apparent conflict, *see id.* at 272, 101 S.Ct. 1097; *Tatum*, 943 F.2d at 379, (2) there "was no valid waiver of the right to independent counsel," *Wood*, 450 U.S. at 274, 101 S.Ct. 1097, and (3) counsel had "an actual conflict of interest," *id.* at 273, 101 S.Ct. 1097. Under *Wood* once a petitioner makes this showing, prejudice is presumed, and the petitioner is entitled to a new trial with conflict-free counsel. *See id.* at 273-74, 101 S.Ct. 1097.

[15][16] *Wood* places a special responsibility on trial courts to police situations that present apparent conflicts. As we have said, "[w]hen the risk of a conflict of interest is brought to the attention of the trial court ... the court has the responsibility to investigate further, to advise the defendant personally, and to receive a knowing waiver if that is the expressed wish of the defendant." *Tatum*, 943 F.2d at 379. If a court fails to initiate an inquiry when it knew or reasonably should have known of an apparent conflict, it has not carried out its responsibility. Careful attention to conflicts is essential to protecting a defendant's Sixth Amendment right to counsel: " 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.... The trial court should protect the right of an accused to have the assistance of counsel.' " *Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (quoting *Glasser v. United States*, 315 U.S. 60, 71, 62 S.Ct. 457, 86 L.Ed. 680 (1942)), *quoted in Tatum*, 943 F.2d at 379. This includes protecting the defendant's right to a lawyer who is free of conflicts. A trial judge's immediate attention to obvious conflicts is also important to maintain the integrity of, and public respect for, the justice system. *See Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (noting that "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them"). *Wood* supports these principles by encouraging (in a practical way) trial judges to deal promptly with apparent conflicts: the case dispenses with the requirement to show adverse effect when a judge should have inquired, yet failed to do so, thus making it somewhat easier to obtain a new trial. [FN1]

FN1. Despite the dissent's suggestion, *see post* at 219, we do not

read *Wood* as overruling *Sullivan* by implication when we point out that *Wood* does not require a defendant to show adverse effect if the trial judge has failed to inquire into an apparent conflict. Because *Sullivan* and *Wood* addressed circumstances that are quite different, the two cases are easily harmonized. In *Sullivan* the trial judge had no duty to inquire because the defendant did not object to multiple representation and there was simply "the mere possibility of a conflict." *Sullivan,* 446 U.S. at 345, 347, 100 S.Ct. 1708. In this context, when the trial court has no duty of inquiry, the Supreme Court requires a defendant to "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan,* 446 U.S. at 348, 100 S.Ct. 1708. *Sullivan,* however, was careful to point out that a trial court must "initiate an inquiry" when it "knows or reasonably should know that a particular conflict exists." *Id.* at 347, 100 S.Ct. 1708. But *Sullivan* did not articulate the defendant's burden when the trial court fails to fulfill a clear duty to inquire. That was left open for *Wood.* In *Wood* the record reflected much more than the "mere possibility" of a conflict. Rather, the state trial judge was faced with an apparent conflict--one that was clearly suggested by the circumstances. Because there was an apparent conflict, *Wood* held that the trial judge had a constitutional duty to inquire. *See Wood,* 450 U.S. at 272, 101 S.Ct. 1097. The failure to fulfill this duty carries a definite consequence, as the Court's remand order establishes: [The state] court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.

Id. at 273-74, 101 S.Ct. 1097. This is not "shorthand for [*Sullivan* ' s] two-part test," *see post* at 220; rather, the requirement for showing adverse effect is clearly omitted.

Our circuit opinions do not prevent us from applying *Wood* in Mickens' case, where the state judge was confronted with an apparent conflict.

In the Fourth Circuit cases mentioned by the dissent (*Gilliam, Beaver,* and *Tatum*), *see post* at 220-22, we did not conclude that the trial judge had a constitutional duty to inquire. As a result, it was proper to apply *Sullivan* and not *Wood.*

***212** [17][18][19] Mickens meets the *Wood* test. First, the district court concluded that Judge Foster "knew, or should have know[n]" of the "apparent possible conflict." *Mickens,* 74 F.Supp.2d at 613-15. On April 3, 1992, Judge Foster dismissed the charges against Timothy Hall due to his death by making a handwritten order on his individual docket sheet. That single-paged docket sheet identified Saunders as Hall's lawyer. "[T]he next business day, Judge Foster appointed Saunders to represent Mickens in the capital murder of Hall." *Id.* at 614. In addition to these circumstances, "[t]he heinous nature of the crime and the publicity it received make it difficult to accept that the connection would have escaped Judge Foster's notice." *Id.* And, "the judge was no doubt aware that Mickens faced charges as to which it might be necessary to counter 'evidence about the victim and about the impact of the murder on the victim's family,' at least at the penalty phase of the case." *Id.* (quoting *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). These facts and circumstances are sufficient to show that Judge Foster knew or should have known of the apparent conflict. [FN2] Mickens also did not waive his right to conflict-free counsel. Since he was never informed of the conflict of interest, he had no opportunity to either consider the conflict or to knowingly and intelligently waive his rights. As we discuss next, Mickens establishes an actual conflict of interest. [FN3]

FN2. The district court concluded that JDR Judge Foster, who handled Mickens' preliminary hearing, "was not relieved of her duty to inquire" into the conflict situation simply because "the trial was to be conducted in another court." *Mickens,* 74 F.Supp.2d at 615. The district court was correct. The right to conflict-free counsel arises at the beginning of a case. *See Holloway,* 435 U.S. at 489-90, 98 S.Ct. 1173 (discussing the importance of conflict-free counsel at the pretrial stage).

FN3. Mickens also argues that he is entitled to a new trial even without showing an actual conflict. Relief is required, he says, simply because the state judge neglected her duty to inquire into a potential conflict of interest. He thus seeks relief under what is sometimes called the "automatic reversal rule," which is based on a sentence from *Wood:* "*Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' " *Wood,* 450 U.S. at 272 n. 18, 101 S.Ct. 1097 (quoting *Sullivan,* 446 U.S. at 347, 100 S.Ct. 1708). At least one circuit (the Second) applies the automatic reversal rule when a judge who knew or should have known of a possible conflict failed to make an inquiry. *See Ciak v. United States,* 59 F.3d 296, 298, 307 (2d Cir.1995) (holding that automatic reversal rule applies to federal habeas cases); *United States v. Levy,* 25 F.3d 146, 153 (2d Cir.1994) (stating automatic reversal rule as follows: "When a possible conflict has been entirely ignored, reversal is automatic."). Because, as we will explain, Mickens has shown an actual conflict, we do not decide whether the "automatic reversal rule" should be adopted in this circuit. The dissent suggests that our application of *Wood* "is functionally equivalent to the automatic reversal rule." *Post* at 222. It is not. We are applying *Wood* in a straightforward way: when the trial court fails to carry out its constitutional duty to inquire into an apparent conflict, the defendant is

entitled to a new trial if his counsel labored under an actual conflict. On the other hand, under the automatic reversal rule the defendant gets a new trial when the trial court fails to inquire into "even the possibility" of a conflict. *Levy*, 25 F.3d at 153. In practice, possible conflicts do not always turn out to be actual conflicts. There is a real difference between the automatic reversal rule and our straight application of *Wood*.

***213** We begin our analysis of the actual conflict issue by considering Mickens' challenge to the test used by the district court. The district court used a modified version of a test for actual conflict developed by the Eleventh Circuit in *Freund v. Butterworth*, 165 F.3d 839 (11th Cir.) (en banc), *cert. denied*, 528 U.S. 817, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999). *Freund* distinguishes between cases of successive representation (such as Mickens') and cases of simultaneous or multiple representation. The *Freund* decision requires the petitioner to satisfy a tougher test in a successive representation case: such a petitioner "must show that either (1) counsel's earlier representation ... was substantially and particularly related to counsel's later representation of petitioner, or (2) counsel actually learned particular confidential information during the prior representation ... that was relevant to petitioner's later case." *Freund*, 165 F.3d at 859 (internal quotation marks, emphasis, and alterations omitted). Moreover, proof of either of these elements may not be enough, and the petitioner may be called upon to introduce "other proof of inconsistent interests." *Id.* (internal quotation marks omitted). Recognizing that neither the Supreme Court nor we have ever restricted proof of a conflict to the "two [*Freund*] scenarios," the district court did modify the test to allow Mickens to meet his burden "through other proof of inconsistent interests ... if the interests actually diverged." *Mickens*, 74 F.Supp.2d at 603 (internal quotation marks omitted).

[20] Even though the district court's modification arguably broadens the *Freund* test, we decline to adopt that test, even as modified. Neither the Supreme Court nor this court has ever held that a stricter test should apply to a case of successive representation. In our most recent opinion involving successive representation, *Burket v. Angelone*, 208 F.3d 172 (4th Cir.), *cert. denied*, --- U.S. ----, 120 S.Ct. 2761, 147 L.Ed.2d 1022 (2000), we neither mentioned *Freund* nor indicated that successive representation cases should be treated any differently than cases of multiple representation. Instead, *Burket* reaffirmed that a variety of conflicting interests may infect a lawyer's representation:

> Counsel's "representation of conflicting interests, however, is not always as apparent as when he formally represents two parties who have hostile interests. He may harbor substantial personal interests which conflict with the clear objective of his representation of the client, or his continuing duty to former clients may interfere with his consideration of all facts and options for his current client."

Burket, 208 F.3d at 185 (quoting *Tatum*, 943 F.2d at 376). To determine whether *Sullivan* 's "actual conflict" requirement is met, we have formulated the following test: "To establish an actual conflict of interest, the petitioner must show that his interests 'diverge[d] with respect to a material factual or legal issue or to a course of action.' " *Williams*, 146 F.3d at 212 (quoting *Sullivan*, 446 U.S. at 356 n. 3, 100 S.Ct. 1708 (Marshall, J., concurring in part and dissenting in part)). *See also Gilbert v. Moore*, 134 F.3d 642, 652 (4th Cir.) (stating same test), *cert. denied*, 525 U.S. 840, 119 S.Ct. 103, 142 L.Ed.2d 82 (1998). We adhere to our existing test.

[21][22] Mickens contends that Saunders labored under one or more actual conflicts of interest. Mickens begins by arguing that his interests diverged from Saunders' because Saunders had a significant personal stake in not revealing his prior representation of Hall. The district court rejected this claim on the basis of Saunders' statements that he saw no conflict of interest and that as far as he was concerned his representation of Hall "[e]nded when I walked into the courtroom and they told me he was dead and the case was gone." We conclude that the district court erred. To begin with, the district court decided to put great weight on Saunders' ***214** testimony based on our observation in *United States v. Young*, 644 F.2d 1008 (4th Cir.1981), that a court "accords great weight to a lawyer's perception of a conflict" when evaluating a conflicts claim. 644 F.2d at 1014. However, the district court did not consider our next crucial statement that "courts necessarily rely in large measure upon the good faith and good judgment of defense counsel in determining whether an actual conflict of interest exists." *Id.* (internal quotation marks omitted). The difficulty with placing "great weight" on Saunders' testimony that he did not see a conflict is that the district court repeatedly found that Saunders did not exercise good judgment. *See, e.g., Mickens*, 74 F.Supp.2d at 605 (noting that Saunders' view that he had no continuing allegiance to Hall was "remarkably wrong"); *id.* at 606 (noting that Saunders' failure to disclose his prior representation of Hall was "inexcusable"); *id.* at 612 n. 20 (finding that Saunders' testimony that "he assumed that [his co-counsel] (and everyone else) knew that he had represented Hall ... lacks evidentiary support and ... borders on the absurd"); *id.* at 612 (finding that Saunders had a "myopic view of the potential conflicts and [an] utter insensitivity to the ethical issues raised by the facts"); *id.* at 605 (stating that "the evidence shows that, regrettably, Saunders never struggled with the ethical issues"); *id.* at 611 (concluding that Saunders' reasons for failing to pursue investigative leads "are not defensible"). In situations such as this where a lawyer fails to exercise good judgment, courts do not hesitate to disregard a lawyer's testimony that he did not perceive a conflict of interest. *See United States v. Swartz*, 975 F.2d 1042, 1046-48 (4th Cir.1992) (rejecting lawyer's statement that he had "[n]o conflict whatsoever" in representing two defendants in same case); *Hoffman v. Leeke*, 903 F.2d 280, 286 (4th Cir.1990) (rejecting lawyer's testimony that "he saw no conflict of interest because he thought [his two clients in the same criminal case] would testify to substantially the same facts"); *cf. Wheat*, 486 U.S. at 163, 108 S.Ct. 1692 (holding that a court may disqualify a lawyer who is willing to accept a client's waiver of a conflict of interest and observing "that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information [about potential problems] to them"). Thus, *Young* does not establish a rule that courts must always accord great weight to a lawyer's perception about whether an actual conflict exists. Rather, when it is clear that the lawyer lacks good faith or good judgment, his testimony may be disregarded, or at least not be given "great weight." Here, we are not suggesting that Saunders' testimony should have been rejected, but it was certainly not entitled to great weight in light of the district court's several findings that confirmed Saunders' poor judgment.

In any event, because the district court took Saunders' testimony as truthful, so do we.

Still, his testimony--taken at whatever weight--does not undermine Mickens' argument that there was an actual conflict. As we have repeatedly recognized, a lawyer's personal interests may "conflict with the clear objective of his representation of the client." *Burket,* 208 F.3d at 185 (quoting *Tatum,* 943 F.2d at 376). *See also Fields,* 956 F.2d at 1298-99 (noting that petitioner arguably demonstrated a conflict when his interests diverged from his lawyer's "interest in protecting his own professional reputation and good-standing"); *United States v. Magini,* 973 F.2d 261, 264 (4th Cir.1992). When Saunders undertook the representation of Mickens, it was clearly established that "[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises." *Sullivan,* 446 U.S. at 346, 100 S.Ct. 1708. *See also* Va.Code Prof'l Responsibility DR5-105(A) (Michie 1992). And, the Virginia Code of Professional Responsibility (as it was called at the time of Mickens' trial) provided that a lawyer had ***215** the duty to "explain any circumstances that might cause a client to question his undivided loyalty." Va.Code Prof'l Responsibility EC 5-19 (Michie 1992). As the district court found, "Saunders' representation of the murder victim, at the time of the murder, is undoubtedly a circumstance 'that might cause a client to question his undivided loyalty.' " *Mickens,* 74 F.Supp.2d at 601. Regardless of whether Saunders believed he could ethically represent Mickens, he was also required to "defer to a client who [held] the contrary belief [by] withdraw [ing] from representation of that client." Va.Code Prof'l Responsibility EC 5-19 (Michie 1992). Saunders thus had the duty to inform both Mickens and the court of the prior representation of Hall. If Mickens had objected, Saunders had a related duty to withdraw.

Once Saunders proceeded with the representation of Mickens in these circumstances, he was potentially subject to disciplinary proceedings, which gave rise to an interest in protecting his professional reputation. In other words, Saunders had an interest in preventing his representation of Hall from coming to light. This interest diverged from Mickens' interest in learning about the earlier representation and in making sure he (Mickens) received conflict-free representation. Saunders was thus caught in an actual conflict. *See Fields,* 956 F.2d at 1298-99 (recognizing potential conflict when client's interest required lawyer "to confess his own negligence or incompetence," but ultimately rejecting claim because once lawyer "frankly admitted [his errors] in open court," "any conflict that might have stemmed from [the lawyer's] interest in protecting his professional standing evaporated"); *cf. United States v. Iorizzo,* 786 F.2d 52, 58 (2d Cir.1986) (holding that defendant established conflict of interest claim when lawyer, "solely to protect" his own interest in his professional reputation, decided to forego cross-examination of witness that lawyer had previously represented); *Government of the Virgin Islands v. Zepp,* 748 F.2d 125, 136 (3d Cir.1984) (holding that an actual conflict existed when defendant's interests diverged from trial counsel's personal interest in avoiding potential criminal and disciplinary charges for destroying evidence in defendant's case). Saunders' testimony that he did not perceive a conflict may speak to whether the conflict caused an adverse effect, but it does not negate the reality of an actual conflict.

Mickens next contends that an actual conflict existed because Saunders could not investigate Hall, using the confidential information he learned from the young man, without violating the ethical duties that he (Saunders) owed to Hall, his former client.

Saunders had a duty to preserve Hall's secrets and confidences even though his employment as Hall's lawyer had ended. *See* Va.Code Prof'l Responsibility DR 4-101, EC 4-6 (Michie 1992). The Supreme Court has recently reaffirmed the common law rule that a lawyer's duty to protect his client's confidences continues after the client's death. *See Swidler & Berlin v. United States,* 524 U.S. 399, 410-11, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998). Saunders also had a duty to zealously represent Mickens. *See* Va.Code Prof'l Responsibility DR 7-101 (Michie 1992). In representing Mickens, Saunders could not pull his punches in order to protect what he knew about Hall.

[23][24] The district court applied the *Freund* test to reject Mickens' conflicts claim on the ground that "Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing." *Mickens,* 74 F.Supp.2d at 606 (emphasis omitted). The district court erred as a matter of law because it focused too narrowly in describing the circumstance (defense on the merits or at sentencing) where confidential information might be relevant or useful. We have held that an actual conflict can also arise at the investigation and plea negotiation stages of a representation. *See Burket,* 208 F.3d at ***216** 185 (" '[A] failure to act on behalf of a client before trial has representational significance.' " (quoting *Tatum,* 943 F.2d at 376)); *Magini,* 973 F.2d at 263 ("A conflict which causes counsel to fail to explore possible plea negotiations may implicate the Sixth Amendment right to counsel."). The proper inquiry, therefore, is whether Saunders' interest (or duty) in maintaining Hall's secrets and confidences diverged from Mickens' interest in pursuing a course of action, specifically, a reasonable pretrial investigation. *See Williams,* 146 F.3d at 212. Here, the divergence of interests was sufficient to create a second actual conflict.

The district court found that Saunders learned the following information through his representation of Hall: "(a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault ...; and (c) Hall was not living with his mother at the time of his death." *Mickens,* 74 F.Supp.2d at 606. The district court also found that Saunders met with Hall for fifteen to thirty minutes and that they discussed "the circumstances surrounding each of the charged crimes." *Id.* at 599. Finally, the district court acknowledged that Saunders obtained confidential information from Hall. *Id.* at 606. Saunders thus learned "confidences" and "secrets" in his representation of Hall that he (Saunders) was bound not to reveal. *See* Va.Code Prof'l Responsibility DR 4-101 (Michie 1992); *Commonwealth v. Edwards,* 235 Va. 499, 370 S.E.2d 296, 301 (1988). Moreover, under Virginia law even the charges against Hall were confidential because they were in Hall's juvenile court records which cannot be opened to those outside the juvenile court system without a court order. *See* Va. Stat. Ann. § 16.1-305.

Juxtaposed to Saunders' duty to remain loyal to Hall by maintaining his confidences and secrets was a duty he owed to his new client, Mickens. As illustrated by the American Bar Association's standards, Saunders had the duty to conduct a thorough pretrial investigation for Mickens: "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *ABA Standards for Criminal Justice* Standard 4-4.1(a) (3d ed.1993). The Supreme Court and our circuit have recognized the ABA standards as "guides to determining what is reasonable." *Strickland,* 466 U.S. at 688, 104

S.Ct. 2052, *quoted in Jones v. Murray*, 947 F.2d 1106, 1110 (4th Cir.1991). Saunders did not investigate (or attempt to develop) any negative information about Hall, the victim of the crime Mickens allegedly committed. Yet the circumstances of this crime (murder and sodomy) suggested that some consideration had to be given to investigating the character and background of the victim. There were no witnesses to Hall's murder, which occurred in a secluded area that was a "known gathering place for homosexuals," *Mickens*, 74 F.Supp.2d at 607. Saunders knew from his representation of Hall that Hall had some tendency to violence or aggressiveness and that for some reason he was no longer living at home, despite his young age. This information, together with the notable location of Hall's murder, at least suggested an investigation into whether consent to the sodomy and self-defense to the murder might be defenses or statutory mitigators. In other words, the negative information Saunders had about Hall had the potential to lead to information about the circumstances of the crime. Indeed, the district court recognized that "a reasonable investigation would have included an examination of Hall's past." *Id.* at 610. Nevertheless, the district court did not see a problem. The court concluded that the confidential information Saunders had about Hall did not create an actual conflict because it "was irrelevant to Mickens' defense" since he denied committing the crime. *Id.* at 606. This analysis misses ***217** the mark because a lawyer has an initial duty to investigate and to make his own, independent appraisal of the case. *See ABA Standards for Criminal Justice* Standard 4-4.1(a). Of course, obvious avenues of investigation do not always lead to relevant evidence or viable defenses. The point is that reasonable areas of investigation must be considered and pursued. Because of Saunders' duty to protect Hall's secrets and confidences, he could not even *consider* an investigation that was suggested by the circumstances. *See Tatum*, 943 F.2d at 376 (noting that actual conflict exists when lawyer's "continuing duty to former client[ ] ... interfere[s] with his *consideration* of all facts and options for his current client") (emphasis added). We recognize that in its adverse effect inquiry the district court "credit[ed] Saunders' testimony that he did not refrain from taking any actions for Mickens because of his earlier representation of Hall." *Mickens*, 74 F.Supp.2d at 612. But that begs the question whether Saunders had an actual conflict in the first place. Saunders' testimony that there was no adverse effect does not address whether Mickens' interests diverged from Saunders' interests in protecting Hall's confidences. Saunders had an actual conflict because he could not even consider an investigation into Hall's character or background, using as a starting point the information he had about the circumstances of the crimes charged against Hall.

Saunders' duty to conduct a reasonable investigation created still another conflicting interest. Because this was a capital case, there was a good chance that someone from the victim's family (perhaps Hall's mother) would testify during the penalty phase. *See* Va. Stat. Ann. § 19.2-264.4 (Michie 1992); *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *Mickens*, 74 F.Supp.2d at 614. Again, there is a duty to "explore all avenues leading to facts relevant to ... the penalty." *ABA Standards for Criminal Justice* Standard 4-4.1(a). Surely this would require defense counsel to consider investigating the victim's relationship with key family members, especially (in this case) the victim's mother since the victim was a juvenile. Here, Saunders, while he represented Hall, learned something about his relationship with his mother and about the fact that he no longer lived at home. In particular, Saunders learned about the circumstances leading to the charge that Hall had "grabbed [his mother] by the arms and shoved her to the ground" shortly before his death. *Mickens*, 74 F.Supp.2d at 599. This confidential or secret information that Saunders had about some aspects of Hall's relationship with his mother also created a conflict: Saunders' interest in preserving Hall's confidences diverged from Mickens' interest in having Saunders consider an investigation into Hall's relationship with his mother.

In sum, Mickens must be afforded a new trial because of the conflict of interest problem. He has shown that (1) the state judge failed to inquire into an apparent conflict that she knew or reasonably should have known existed, (2) he did not waive any conflict, and (3) his lawyer, Saunders, had an actual conflict of interest. This is sufficient under *Wood v. Georgia* to establish the merits of his claim that he was deprived of his Sixth Amendment right to representation that is free of conflicts of interest. Prejudice is therefore presumed, and Mickens is entitled to a new trial. [FN4]

> FN4. Mickens also argues that he is entitled to relief under a straightforward application of the *Sullivan* test, that is, he has shown both actual conflict and adverse effect. Because the presence of an actual conflict is sufficient to presume prejudice in the circumstances of this case, we need not consider the question of adverse effect.

III.

[25] Mickens next argues that the district court erred in rejecting his claims for ineffective assistance of counsel based on his trial counsels' inadequate pretrial investigation ***218** and failure to request a psychiatric evaluation for the resentencing. The first of these claims is that counsel were ineffective because they failed to investigate (or to request an investigator) for the purpose of gathering evidence for a consent defense and for use in mitigation at sentencing. The district court held that Mickens' claims of inadequate investigation were defaulted because he had not fairly presented them to the Virginia courts. *See Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997). We agree with the district court. *See Mickens*, 74 F.Supp.2d at 598.

[26] Mickens' second ineffective assistance claim focuses on counsels' failure to obtain a mental health expert to perform an evaluation for the resentencing. The district court rejected this argument on the merits. On appeal Mickens has not shown us what a mental health expert would have discovered beyond what counsel already knew at the time of the resentencing. Moreover, this claim was also adjudicated against Mickens on the merits in state court. *See Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1516, 146 L.Ed.2d 389 (2000) ("The relevant provision, 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III), prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." (quoting 28 U.S.C. § 2254(d)(1))). We also reject this claim.

IV.

Mickens argues that the evidence was insufficient to prove attempted forcible sodomy. He further contends that absent sufficient proof of the underlying predicate offense, the capital murder conviction cannot stand. The district court concluded that this

claim was defaulted because it was not fairly presented to the state courts. *See Matthews,* 105 F.3d at 911. Again, we agree with the district court. *See Mickens,* 74 F.Supp.2d at 597.

V.

[27] In his reply brief Mickens raises the argument that the ineffective assistance of his state habeas counsel excuses the default of additional ineffective assistance of counsel claims raised for the first time in his federal habeas petition. We have held that ineffective assistance by state habeas counsel fails to establish cause, *see Mackall v. Angelone,* 131 F.3d 442, 449 (4th Cir.1997) (en banc) ("Because [petitioner] has no right to effective assistance of counsel in his state habeas proceedings, he cannot demonstrate cause to excuse the procedural default of his claims that his trial and appellate counsel were constitutionally ineffective."), *cert. denied,* 522 U.S. 1100, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998), and the district court held the additional claims defaulted on this ground. We adopt the district court's analysis on this issue. *See Mickens,* 74 F.Supp.2d at 595.

VI.

A certificate of appealability is issued. The judgment of the district court is reversed because Walter Mickens' lead trial counsel had a conflict of interest that the judge appointing counsel failed to look into. On remand the district court will grant the writ of habeas corpus unless the Commonwealth of Virginia retries Mickens within 180 days of the issuance of our mandate.

REVERSED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent. Because Mickens has failed to establish that his attorney's conflict of interest adversely affected his representation, I would affirm the decision of the district court and deny Mickens' petition for habeas corpus relief.

***219** I.

I accept, for the purposes of argument, the majority's conclusion that Mickens' attorney labored under an actual conflict of interest. I must disagree, however, with the majority's conclusion that the Supreme Court's decision in *Wood v. Georgia,* 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), relieves Mickens from his burden of establishing that his attorney's conflict of interest adversely affected his representation.

As the majority has noted, a criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest. *Wood,* 450 U.S. at 271, 101 S.Ct. 1097; *United States v. Tatum,* 943 F.2d 370, 375 (4th Cir.1991). The general standard for ineffective assistance of counsel has most clearly been articulated by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail, a petitioner alleging ineffective assistance of counsel must establish, (1) that his attorney's representation fell below an objectively reasonable performance and (2) that the inadequate performance prejudiced the petitioner's case. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. This constitutional standard for establishing ineffective assistance of counsel applies equally in collateral habeas corpus proceedings as it does on direct appeal. *Strickland,* 466 U.S. at 697, 104 S.Ct. 2052.

Even as it clarified the applicable standard for ineffective assistance of counsel, however, the *Strickland* Court harmonized existing case law and noted exceptions to the new standard it articulated, recognizing special circumstances addressed by its prior decisions. The *Strickland* Court recognized that a claim of ineffective assistance of counsel predicated on a defense attorney's conflict of interest presents a special case. *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052. To establish ineffective assistance of counsel predicated on a conflict of interest a defendant must establish only that (1) his attorney labored under an actual conflict of interest that (2) adversely affected the representation. See *Cuyler v. Sullivan,* 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). After a defendant satisfies this two-part test, prejudice is presumed and a defendant need not show that the conflict altered the outcome of the proceeding. *Sullivan,* 446 U.S. at 349-50, 100 S.Ct. 1708.

In *Wood,* the Court addressed a conflict of interest issue apparent on the face of the record even though the conflict had not been addressed below. *Wood,* 450 U.S. at 262-63, 101 S.Ct. 1097. Because the case arose as an appeal from a revocation of probation, the Court analyzed the conflict under due process, rather than Sixth Amendment grounds. *Wood,* 450 U.S. at 271-72, 101 S.Ct. 1097. Nonetheless, the Court cited *Sullivan* for the proposition that the Sixth Amendment ensures a right to counsel free from conflict of interest. *Wood,* 450 U.S. at 271, 101 S.Ct. 1097. Without the benefit of briefing, the Court could not determine whether counsel labored under an actual conflict of interest. *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. The record was adequate to establish, however, "that the possibility of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the [trial] court a duty to inquire further." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. The *Wood* Court thus clarified that trial courts have an obligation to inquire into potential conflicts of interest when they know or reasonably should know of a conflict.

The Supreme Court remanded the case and instructed the trial court "to determine whether the conflict of interest that this record strongly suggests actually existed" but did not expressly instruct the ***220** trial court to identify an adverse effect. *Wood,* 450 U.S. at 273, 101 S.Ct. 1097. The majority concludes that, because the *Wood* Court did not expressly require the trial court to identify an adverse effect on remand, a defendant need not establish an adverse effect when a trial court had a duty to inquire into a conflict of interest but fails to do so. Thus, the majority reads *Wood* to have overruled the second part of *Sullivan's* two-part standard by implication. "Overruling by implication is not favored." *Catawba Indian Tribe of South Carolina v. South Carolina,* 978 F.2d 1334, 1347 (4th Cir.1992).

At the risk of self-immolation, I should say that the decision in *Wood,* to me, has not turned out to be a model of clarity. The *Wood* Court was concerned about the potential conflict of interest faced by a defense attorney hired and compensated by the defendants' employer whose interests appeared to diverge from their own. *Wood,* 450 U.S. at 269-71, 101 S.Ct. 1097. The Court cited *Sullivan* for the proposition that a defendant's right to effective counsel includes a right to "representation that is free from conflicts of interest." *Wood,* 450 U.S. at 271, 101 S.Ct. 1097. The Court then noted that "[o]n the record before us, we cannot be sure whether counsel was *influenced in his basic strategic decisions* by the interests of the employer who hired him." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097 (emphasis added). If the defendants' attorney had been so influenced, the Court

ruled, "the due-process rights of petitioners were not respected." *Wood,* 450 U.S. at 272, 101 S.Ct. 1097. That language may only mean that the Court required not just an actual conflict, but also an indication that the conflict adversely affected the counsel's basic strategic decisions. When read in this light, the *Wood* Court's terse instruction to the trial court on remand does not bear the Constitutional weight the majority ascribes to it. As this court has recognized, the two requirements of the *Sullivan* test, "an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap." *United States v. Tatum* 943 F.2d 370, 375 (4th Cir.1991). Thus, the *Wood* Court's instruction to the trial court amounts to no more than shorthand for an explicit two part test that the *Wood* Court did not even have occasion to quote in its majority decision much less to overrule. Indeed, *subsequent to Wood,* found in 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220, the holding of *Sullivan* was underscored by its citation in *Strickland:* "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052 (quoting *Sullivan,* 446 U.S. at 348, 100 S.Ct. 1708).

Only in extraordinary circumstances not present here has the Supreme Court reversed a conviction because of an actual conflict of interest without a determination that the conflict of interest adversely affected the representation. The only occasions I have found in which the Supreme Court has not inquired into an adverse effect are those cases in which a defense attorney objected to the conflict of interest and the trial court nonetheless declined to address the conflict. In such a case, the Supreme Court has held, reversal is required without inquiry into either actual conflict or adverse effect. See *Holloway v. Arkansas,* 435 U.S. 475, 488-89, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

The majority decision is also contrary to this court's interpretation of *Wood.* In *United States v. Gilliam,* 975 F.2d 1050 (4th Cir.1992), this court addressed *Wood* without concluding, as does the majority here, that the Supreme Court had partially overruled *Sullivan.* In *Gilliam,* the defendant did not raise the issue of conflict resulting from multiple representation until he obtained new counsel at the sentencing phase of his trial and, as a result of his delay, the trial court declined to conduct a ***221** hearing into the possibility of conflict. *Gilliam,* 975 F.2d at 1054. On appeal, this court concluded that the defendant had alleged an actual conflict and noted that "if the court is aware, or should be aware, of a particular conflict, it should conduct a sua sponte inquiry into its existence." *Gilliam,* 975 F.2d at 1053 (quoting *United States v. Akinseye,* 802 F.2d 740, 744 (4th Cir.1986)). Without citing *Wood,* the court held that "failure of the court to make inquiry under Rule 44(c) is not, standing alone, sufficient to require reversal of a conviction" and remanded to the district court to conduct a hearing into the conflict. *Gilliam,* 975 F.2d at 1053-54. The court cited the *Sullivan* two-part test as the applicable standard. See *Gilliam,* 975 F.2d at 1054 n. 5. Rather than reverse, this court remanded, noting that "we do not mean to dictate the result to be reached by the lower court" on remand, and left open the possibility that the district court might deny the claim on the grounds that there was "no suggestion that the alleged conflict *impaired the ability of counsel* to present the case to the jury." *Gilliam,* 975 F.2d at 1054 (emphasis added).

Again, in *Beaver v. Thompson,* this court noted that "[t]o prevail on a claim of conflict of interest, Beaver must present convincing

evidence of an actual conflict and a resulting adverse effect on performance." 93 F.3d 1186, 1192 (4th Cir.1996). This court applied the two-part *Sullivan* test without citing *Wood* in a case where the defense attorney was a part-time prosecutor for the neighboring county and where the local trial court would presumably have been aware of the potential conflict.

The majority relies on language in *United States v. Tatum* that "[i]n *Wood v. Georgia,* the Court flatly stated that a conflict situation which is not addressed by the trial court requires reversal." *Tatum,* 943 F.2d at 379 (citations omitted). The *Tatum* court cited *Wood* in response to an argument, raised by the government and accepted by the district court, that the court's review of the conflict of interest issue was premature because facts of record had not yet been developed. *Tatum,* 943 F.2d at 379. The implication was that the defendant would be free to raise the issue on collateral habeas corpus review rather than on direct appeal. Nonetheless, the *Tatum* court cited the two-part test of *Sullivan* as the applicable standard. *Tatum,* 943 F.2d at 375. The court then applied the test concluding that "known facts lead inevitably to the conclusion that [defendant's counsel] had unacceptable conflicts of interest" and "that *pretrial strategies were adversely affected* by those conflicts." *Tatum,* 943 F.2d at 380 (emphasis added). The court concluded that when, as in the case before it, "the record supports these conclusions, we may confront the issue on direct appeal." *Tatum,* 943 F.2d at 380 (citing *Wood,* 450 U.S. at 272, 101 S.Ct. 1097). Thus, contrary to the majority's holding, *Tatum* expressly upheld and applied the *Sullivan* two-part test and cited *Wood* for the more narrow jurisdictional point that this court could appropriately address the conflict of interest issue on direct appeal.

II.

Mickens asserts that, when a trial court has failed to inquire into a potential conflict even though it knew or should have known of the conflict, footnote 18 of the *Wood* decision requires automatic reversal without any inquiry into the existence of either an actual conflict or an adverse effect. See, e.g., *United States v. Levy,* 25 F.3d 146, 153 (2nd Cir.1994); *Unites States v. Burney,* 756 F.2d 787, 791 (10th Cir.1985). The relevant footnote states that "*Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' " *Wood,* 450 U.S. at 273 n. 18, 101 S.Ct. 1097 (internal quote from *Sullivan,* 446 U.S. at 347, 100 S.Ct. 1708).

***222** The majority declines to reach Mickens' argument about footnote 18 because it concludes he has identified an actual conflict and that the *Wood* Court's instruction to the trial court on remand eliminates the requirement of an adverse effect. See Majority opinion at 212 n. 3. On its face, the majority's rule is distinct from the automatic reversal rule in that it requires a reviewing court to find that an actual conflict of interest existed before it may reverse a conviction. See Majority opinion at 210-11. In practice, however, the rule adopted by the majority, which eliminates the adverse effect requirement when a trial court fails to inquire into a conflict about which it should have known, is functionally equivalent to the automatic reversal rule.

In the absence of an objection from defense counsel, the trial court need not conduct an inquiry unless it "knows or reasonably should know that a *particular* conflict exists." *Sullivan,* 446 U.S. at 347, 100 S.Ct. 1708 (emphasis added). In most cases, the same facts that would lead an appellate court applying Mickens' automatic reversal rule to

conclude that the trial court should have been aware of a "particular conflict" would also lead a court applying the majority's rule to conclude that an actual conflict existed. Under either rule, the result is reversal of the defendant's conviction. In this case, for example, the majority finds that the trial court should have been aware of the conflict because Mickens faced charges which might require his defense counsel to counter evidence about the victim and the impact of the murder on the victim's family. See majority opinion at 212. By the same token, the majority finds an actual conflict because Mickens' counsel was obligated to investigate and to consider using evidence about the victim to challenge the nature of the crime and the impact of the murder on the victim's family. See majority opinion at 216-17.

For the same reasons that I reject the majority's proposed rule, which requires automatic reversal in practice, I must reject the rule asserted by Mickens, which requires automatic reversal on its face. Despite Mickens' assertions, footnote 18 of *Wood* can not mean that automatic reversal is required when a trial court fails to inquire into a conflict about which it knew or should have known. That rule would be inconsistent with the manner in which the *Wood* Court disposed of the case before it. In *Wood*, the Court ruled that the "possibility of a conflict of interest was sufficiently apparent ... to impose upon the [trial] court a duty to inquire further" and noted that the trial court had failed to conduct such an inquiry. *Wood*, 450 U.S. at 272, 101 S.Ct. 1097. These holdings satisfy the predicates necessary to trigger the automatic reversal rule asserted by Mickens. Nonetheless, the *Wood* Court chose to remand the case before it to the trial court for an inquiry into the conflict rather than to reverse the trial court's decision. *Wood*, 450 U.S. at 273, 101 S.Ct. 1097.

I should add that the footnote language upon which Mickens relies should be considered as a response by the *Wood* majority to Justice White's dissent, not an attempt to create a new rule requiring automatic reversal. Justice White argued that the Court did not have jurisdiction to address the conflict of interest apparent from the record because the conflict had not been raised in the courts below. *Wood*, 450 U.S. at 280, 101 S.Ct. 1097. In response, the *Wood* Court's footnote 18 defended its jurisdiction by indicating that the trial court's failure to conduct an inquiry constituted error under the rule of *Sullivan* and noting that *Sullivan* did not prohibit "the raising of a conflict-of-interest problem that is apparent in the record." *Wood*, 450 U.S. at 273 n. 18, 101 S.Ct. 1097 (quoting *Sullivan*, 446 U.S. at 347, 100 S.Ct. 1708). Subsequent decisions have cited *Wood* for this procedural point. See *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33, 114 S.Ct. 425, 126 L.Ed.2d 396 (1993); *Tatum*, 943 F.2d at 380.

***223** III.

Because I disagree with the majority's conclusion that *Wood* has eliminated the requirement that an actual conflict adversely affect the representation and reject Mickens invitation to adopt the automatic reversal rule, I should address briefly whether Mickens has established an adverse effect in this case.

I note, especially, that the majority decision does not take issue with the finding of the district court that Saunders' conflict of interest caused no adverse effect in the representation of Mickens in this case. A reference to the reported opinion of the district court is instructive. Commencing at 74 F.Supp.2d, page 606, and continuing to page 613, the district court considered each of Mickens' claims of adverse effect:

Saunders' failure to raise a consent defense; failure to investigate or raise any negative information about Hall; failure to engage in meaningful plea negotiations; failure to appraise the sentencing court of Hall's pending charges or strained relationship with his mother; failure to pass along information to his co- counsel; and making a deficient investigation. The district court considered each of these items in great detail, and supported its findings with page and exhibit references from the record. Its findings are largely factual, and the majority does not contend they are clearly erroneous.

The majority correctly states that the existence of a conflict presents a mixed question of law and fact subject to de novo review, *Sullivan*, 446 U.S. at 342, 100 S.Ct. 1708, and that the district court's factual findings are subject to the clearly erroneous standard. *Fields v. Attorney General*, 956 F.2d 1290, 1297 n. 18 (4th Cir.1992). However, the adverse effect inquiry, in my view, is so heavily fact dependent that I believe considerable deference must be given to the findings of the district court.

A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another. See *Tatum*, 943 F.2d at 376. Thus both taking affirmative actions and failing to take actions "that are clearly suggested by the circumstances" can indicate an adverse effect. *Tatum*, 943 F.2d at 376. Based on our holding in *Tatum*, I agree with the district court's thoughtful articulation of a three-part standard for showing an adverse effect which, as in any other civil action, Mickens must establish by a preponderance of the evidence. *Mickens*, 74 F.Supp.2d at 603-04 (citing *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir.1999) (en banc)). First, the defendant must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second the defendant must show that the alternative strategy or tactic was objectively reasonable under the facts of the case. Because prejudice is presumed, the petitioner need not show that the tactic or strategy would have altered the outcome of the trial, rather he must only establish that the alternative "possessed sufficient substance to be a viable alternative." *Freund*, 165 F.3d at 860. Finally, the defendant must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Mickens challenges this standard, arguing that neither this circuit nor the Supreme Court has required a petitioner to establish a link between an adverse effect and an actual conflict. Such a link is implicit, however, in the Supreme Court's requirement that a defendant show that "his counsel actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348, 350, 100 S.Ct. 1708. As this court has noted, the two requirements, "an actual conflict of interest *resulting in an adverse effect* on counsel's performance, are often intertwined, making the factual analyses of them overlap." *Tatum*, 943 F.2d at 375 (emphasis added).

I conclude that the district court applied the appropriate standard to evaluate the ***224** adverse effects asserted by Mickens. Because I agree with the district court that many of Mickens' assertions of adverse effect were not viable defense strategies and that those that were viable defense strategies were not linked to his attorney's conflict of interest, I agree that there was no adverse effect from Saunders' conflict of interest.

IV.

To sum up the case, the rule of *Cuyler v. Sullivan* is that in order to prevail in a case such as this "... a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 350, 100 S.Ct. 1708. That rule was endorsed by the Court explicitly in *Strickland v. Washington*, 466 U.S. at 692, 104 S.Ct. 2052: "Prejudice is presumed only if the defendant demonstrates that ... 'an actual conflict of interest adversely affected his lawyer's performance.' " *Sullivan* was decided in 1980, and *Strickland* in 1984. The majority holds that the intervening 1981 case of *Wood v. Georgia* has changed that rule so that an adverse effect is no longer required. I am of opinion that *Wood* did not change the *Sullivan* rule and, for that reason, I respectfully dissent.

END OF DOCUMENT

74 F.Supp.2d 586
(Cite as: 74 F.Supp.2d 586)

Walter MICKENS, Jr., Petitioner,
v.
Fred W. GREENE, Warden, Respondent.

No. Civ.A. 3:98cv102.

United States District Court,
E.D. Virginia,
Richmond Division.

Nov. 5, 1999.

Following affirmance, 252 Va. 315, 478 S.E.2d 302, of conviction of capital murder and sentence of death, petitioner sought writ of habeas corpus. The District Court, Payne, J., held that: (1) several of petitioner's claims were procedurally defaulted; (2) evidence supported conviction; (3) petitioner was not denied effective assistance of counsel with respect to pretrial investigation or lack of psychiatric evaluation for sentencing; and (4) trial counsel's potential conflict of interest did not warrant reversal of conviction.

Petition denied.

[1] HABEAS CORPUS k319.1

197k319.1
A state prisoner must exhaust all available state remedies before he can apply for federal habeas relief.

[2] HABEAS CORPUS k363
197k363
To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court; fair presentation contemplates that both the operative facts and the controlling legal principles must be presented to the state court.

[2] HABEAS CORPUS k380.1
197k380.1
To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court; fair presentation contemplates that both the operative facts and the controlling legal principles must be presented to the state court.

[2] HABEAS CORPUS k382
197k382
To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court; fair presentation contemplates that both the operative facts and the controlling legal principles must be presented to the state court.

[3] HABEAS CORPUS k382
197k382
Before bringing federal habeas petition, the petitioner is obligated, in state court, to identify the federal constitutional right purportedly infringed, identify the facts thought to support such a violation, and to explain how those facts establish a violation of his constitutional rights.

[3] HABEAS CORPUS k383
197k383
Before bringing federal habeas petition, the petitioner is obligated, in state court, to identify the federal constitutional right purportedly infringed, identify the facts thought to support such a violation, and to explain how those facts establish a violation of his constitutional rights.

[4] HABEAS CORPUS k382
197k382
The exhaustion requirement is not satisfied if the petitioner presents new legal theories or

factual claims for the first time in his federal habeas petition.

[5] HABEAS CORPUS k422
197k422
If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the petitioner has procedurally defaulted his federal habeas claim in federal court.

[6] HABEAS CORPUS k314
197k314
A procedural default occurs when a federal habeas petitioner has failed to exhaust available state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.

[7] HABEAS CORPUS k401
197k401
Absent a showing of cause and prejudice or a fundamental miscarriage of justice, a federal habeas court is precluded from reviewing the merits of a defaulted claim.

[7] HABEAS CORPUS k404
197k404
Absent a showing of cause and prejudice or a fundamental miscarriage of justice, a federal habeas court is precluded from reviewing the merits of a defaulted claim.

[8] HABEAS CORPUS k405.1
197k405.1
To demonstrate "cause" which will excuse the default of claims, habeas petitioner must establish that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court at the appropriate time.

[9] HABEAS CORPUS k406
197k406
Ineffective assistance of counsel may constitute "cause" for a procedural default under certain circumstances.

[10] HABEAS CORPUS k406
197k406
Alleged ineffective assistance of state habeas counsel did not excuse federal habeas petitioner's default of certain claims, despite petitioner's allegation that limitations on his literacy capacity precluded participation in state habeas proceedings; petitioner had no constitutional right to effective assistance of counsel in state habeas proceeding, and petitioner's notarized signature, attached to state habeas petition, reflected that petitioner had read petition and that petition had been read to him. U.S.C.A. Const.Amend. 6.

[11] HABEAS CORPUS k406
197k406
For an error of counsel to constitute cause for default, a habeas petitioner must first possess a constitutional right to assistance of counsel. U.S.C.A. Const.Amend. 6.

[12] HABEAS CORPUS k690
197k690
A petitioner has no constitutional right to assistance of counsel in state habeas proceedings, even though claims of ineffective assistance of trial counsel can only be raised on state collateral review. U.S.C.A. Const.Amend. 6.

[13] HABEAS CORPUS k401
197k401
To pass defaulted claims through the actual innocence portal, habeas petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.

[14] HABEAS CORPUS k493(2)
197k493(2)
A federal habeas petitioner is entitled to

relief on a challenge to the sufficiency of the evidence only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

[15] SODOMY k1
357k1
Under Virginia law, the elements of attempted forcible sodomy include an intent forcibly to sodomize an individual and a direct, but ineffectual, act toward achievement of sodomy.

[16] HABEAS CORPUS k382
197k382
Habeas petitioner's theory that victim of attempted sodomy had voluntarily gone to location of offense was defaulted, where that theory had never been presented previously to state courts.

[17] SODOMY k6
357k6
Evidence did not support defendant's claim that victim of attempted sodomy had consensually engaged in sexual activity; victim exhibited bruises on front of his neck, victim sustained multiple stab wounds, and there were transfer stains on back of victim's thighs.

[18] HABEAS CORPUS k486(1)
197k486(1)
In order to avoid the distorting effects of hindsight, a court, on federal habeas review, is required to evaluate the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. U.S.C.A. Const.Amend. 6.

[19] HABEAS CORPUS k338
197k338
Habeas petitioner's claim that state trial counsel were ineffective for failing to request appointment of a criminal investigator was procedurally defaulted, where petitioner never presented that claim to state courts. U.S.C.A. Const.Amend. 6.

[20] CRIMINAL LAW k641.13(7)
110k641.13(7)
State trial counsel were not deficient for failing to request psychiatric examination of defendant for purposes of sentencing in capital murder trial; expert had determined that defendant was sane at time of offense and was competent to stand trial, defendant refused to take test prior to sentencing, and mitigating value of such evidence would have been obscured by fact that defendant's purported mental infirmity was caused by sniffing glue and that defendant continued to abuse inhalants while incarcerated. U.S.C.A. Const.Amend. 6.

[21] CRIMINAL LAW k641.13(5)
110k641.13(5)
When a seemingly lucid and rational client rejects the suggestion of a psychiatric evaluation and there is no indication of a mental or emotional problem, a trial lawyer may reasonably forego insistence upon an examination.

[22] CRIMINAL LAW k998(21)
110k998(21)
Under Virginia law, a postconviction petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition.

[23] HABEAS CORPUS k374.1
197k374.1
In determining whether habeas petitioner was unable to present a claim to a state court in postconviction relief proceedings, for purposes of procedural default on federal habeas petition, the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition.

[24] HABEAS CORPUS k407
197k407
Habeas petitioner established cause for his failure to raise, in state court, the claim that his trial counsel had engaged in conflict of interest based on counsel's earlier representation of murder victim in juvenile proceedings; counsel did not disclose to petitioner the earlier representation of victim, and petitioner did not have access to the confidential juvenile records. U.S.C.A. Const.Amend. 6.

[25] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly if a conflict of interest arises during the course of a trial. U.S.C.A. Const.Amend. 6.

[26] HABEAS CORPUS k481
197k481
To establish actual prejudice from error at trial, habeas petitioner must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

[27] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
To demonstrate that he was deprived of the Sixth Amendment right to conflict- free counsel, defendant can proceed on one of two theories: (A) that counsel had a potential conflict of interest that prejudiced his defense; or (B) that an actual conflict of interest adversely affected his lawyer's performance. U.S.C.A. Const.Amend. 6.

[28] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
In the context of multiple or simultaneous representations, a lawyer has an actual, as opposed to a potential, conflict of interest when the interest of the petitioner and the other client diverged with respect to a material factual or legal issue or to a course of action. U.S.C.A. Const.Amend. 6.

[29] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
A potential conflict of interest exists if the interests of the defendant may place the lawyer under inconsistent duties at some time in the future.

[30] HABEAS CORPUS k487
197k487
Even though habeas petitioner is not required to demonstrate prejudice from trial counsel's conflict of interest, he must show that the conflict was deleterious or harmful to counsel's advocacy. U.S.C.A. Const.Amend. 6.

[31] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
To prove an adverse effect from trial counsel's conflict of interest, habeas petitioner must satisfy three elements: first, he must point to some plausible alternative defense strategy or tactic that might have been pursued; second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts; finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense.

[32] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
Habeas petitioner failed to establish that his trial counsel engaged in an actual conflict of interest that prejudiced petitioner, by representing petitioner after having represented, in an earlier juvenile proceeding, the victim killed by petitioner, even though counsel should have disclosed his earlier representation of victim; there was no correlation between the two representations, counsel learned no confidential information from victim's case that was relevant to petitioner's defense, and there was no adverse effect from counsel's representation of both victim and petitioner. U.S.C.A. Const.Amend. 6.

[33] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
For purpose of determining whether defense counsel has engaged in conflict of interest, substantial relatedness between the two matters exists when the present action and the past representation concern the very same subject matter or when the prior representation concerned the same criminal transactions and same events at issue in defendant's case. U.S.C.A. Const.Amend. 6.

[34] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
The effective performance of counsel requires meaningful compliance with the duty of loyalty, and the duty to avoid conflict of interests can lead to ineffective representation. U.S.C.A. Const.Amend. 6.

[35] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
Breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel; until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. U.S.C.A. Const.Amend. 6.

[36] CRIMINAL LAW k641.5(7)
110k641.5(7)
The duty to inquire into apparent conflicts of interest on part of trial counsel arises before the case winds its way to the particular court and judge tasked with conducting the defendant's trial. U.S.C.A. Const.Amend. 6.

[37] CRIMINAL LAW k641.5(7)
110k641.5(7)
Before appointing counsel for murder defendant, state court was required to inquire into possible conflict presented by fact that appointed counsel had previously represented victim in a juvenile matter. U.S.C.A. Const.Amend. 6.

[38] HABEAS CORPUS k487
197k487
Reversal of habeas petitioner's murder conviction was not warranted by failure of state court to inquire into possible conflict of interest that arose from defense counsel's prior representation of victim in a juvenile proceeding, where the potential conflict never ripened into an actual conflict. U.S.C.A. Const.Amend. 6.

***589** Robert E. Lee, Jr., Richmond, VA, Robert J. Wagner, Wagner & Wagner, Richmond, VA, for plaintiff.

Robert Q. Harris, Office of the Attorney General, Richmond, VA, for defendant.

***590** MEMORANDUM OPINION

PAYNE, District Judge.

Pursuant to 28 U.S.C. § 2254, Walter Mickens, a Virginia state prisoner, under sentence of death, filed a petition for a writ of habeas corpus challenging his conviction in the Circuit Court for the City of Newport News for capital murder. The Respondent has moved to dismiss the petition. After conducting an evidentiary hearing on one issue, the Court ordered further briefing. The action is ripe for disposition. Jurisdiction exists pursuant to 28 U.S.C. § 2254. [FN1]

FN1. Because Mickens filed his petition for a writ of habeas corpus after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") on

April 24, 1996, review of the petition is governed by the deferential standards of § 28 U.S.C. § 2254(d), as amended by the AEDPA. See Mueller v. Angelone, 181 F.3d 557, 570 (4th Cir.1999); Green v. French, 143 F.3d 865, 868 (4th Cir.1998), cert. denied, --- U.S. ----, 119 S.Ct. 844, 142 L.Ed.2d 698, (1999).

I. SUMMARY OF THE RECORD

On June 3, 1993, a jury, sitting in the Circuit Court for the City of Newport News, found Mickens guilty of the capital murder of Timothy Jason Hall in the commission of, or subsequent to the commission of, attempted forcible sodomy. On June 7, 1993, the jury concluded that Mickens would pose a future danger to society and that the murder was outrageously and wantonly vile and thereupon fixed Mickens' punishment at death. Mickens appealed his conviction and sentence to the Supreme Court of Virginia.

Upon review of the evidence, conducted in the light most favorable to the Commonwealth, the Supreme Court of Virginia found the following:

On March 28, 1992, Timothy Jason Hall, age 17, resided with 14-year-old Raheem Gordon and Gordon's father in an apartment located at 28th and Washington Streets in the City of Newport News. Hall and Gordon were roommates, and they often exchanged clothes, including shoes.

That day, between 7:00 and 8:00 p.m., Hall gave Gordon a ride, in Hall's automobile, to a party at the nearby Towers apartment building. At the time, Hall was wearing a pair of Gordon's Nike brand "Cross Trainer" tennis shoes. He also was wearing blue jeans and a shirt imprinted with either the word, "Duke," or the words, "Miami Hurricanes." Hall had intended to return to the party, but he never did. Neither Gordon nor his father ever saw Hall after that evening.

Vincent West and Bruce Mitchell also attended the party. About 8:00 p.m., they left the party and went to a nearby convenience store. After purchasing a few items and leaving the store, they sat in a park adjacent to the Towers apartment building. While sitting there, West and Mitchell saw a man with a bicycle, hiding in some bushes and looking at them. The man later was identified as the defendant, Mickens.

The following day, Gordon saw Hall's automobile. It was parked on West Avenue, near 28th Street, close to the Towers apartment building and in the same place it had been parked the previous night.

On March 30, 1992, about 12:30 p.m., Chris Basford was walking along the James River between 25th and 30th Streets when he saw a body beneath an abandoned construction company building. The body of a male Caucasian was lying face down on a mattress under a sheet of plywood. The body was nude from the waist down, except for white athletic socks, and its legs were spread apart approximately 12 inches. The victim was identified as Timothy Jason Hall.

Pubic hairs were recovered from the victim's buttocks. Bloody "transfer" stains were evident on the outsides of the victim's thighs, and a white liquid substance was observed close to the victim's ***591** anus. Cigarette butts lying near the mattress also were recovered, and the mattress cover was seized for scientific examination. Nearby, the police found a pair of men's blue jeans and white underwear shorts that had washed up in the surf of the river. Gordon identified the clothes as those worn by Hall on the evening of March 28, 1992.

An autopsy revealed 143 separate "sharp force injuries" to the victim's body. Of the injuries, 62 were paired stab injuries that could have been caused by a multiple-blade knife, 13 were single stab wounds, and three were paired incised wounds.

The medical examiner who performed the autopsy concluded that the victim had bled to death and that 25 of the 143 wounds were fatal. The fatal wounds included four pairs of stab wounds that punctured the right lung, three single stab wounds that punctured the left lung, seven stab wounds to the skull that penetrated the brain, a stab wound to the forehead that also penetrated the brain, one pair of stab wounds that perforated the liver, and a pair of stab wounds to the right neck that severed the carotid artery and the jugular vein.

The medical examiner opined that the fatal wounds may not have caused instant death. Instead, she estimated that the victim could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, the victim may have been conscious.

On the evening of April 4, 1992, the police were informed that a black male, wearing a blue and white jacket and riding a bicycle, had assaulted a juvenile. Responding to this information, Police Officer D.A. Seals and Detective Dallas Mitchell found Mickens riding a bicycle in the parking area of the abandoned construction company building.

Seals exited the police car, displayed his badge, and approached Mickens. Mickens, thereupon, fled on his bicycle. Shortly thereafter, Seals and Mitchell again came upon Mickens as he was being detained by other police officers. Mickens was arrested at 7:00 p.m. on the charges involving the juvenile.

Mickens agreed to talk with the police after being advised of his Miranda rights. Officer Mitchell told Mickens that he knew Mickens had killed Hall, but the officer did not tell Mickens how Hall had been murdered. In denying involvement in Hall's murder, Mickens said, "You didn't find any knife on me; did you?"

The following morning, warrants were obtained charging Mickens with Hall's murder and attempted sodomy. When Officer Seals handed Mickens copies of the warrants, Mickens said, "I accept the warrants, I accept the charges." Seals asked Mickens what was meant by that statement, and Mickens responded, "Mother f__r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael Jacobs wearing the Nike brand "Cross Trainer" tennis shoes that Hall had been wearing when Gordon had last seen Hall alive. Jacobs told the police that he had bought the shoes from Mickens for $5.00 the previous week.

An examination of the pubic hairs removed from Hall's buttocks revealed that they were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens. The expert who examined the hairs further testified that the hairs could not have originated from Hall because he was a Caucasian. The witness also stated that tissue was attached at the roots of the hairs, indicating the hairs had been forcibly removed, possibly by the rubbing of the genitals against Hall's buttocks.

An examination of a stain found on the mattress cover revealed human sperm. Through DNA analysis (RFLP type) [footnote omitted] of the sperm and of blood samples taken from Hall ***592** and Mickens, the expert determined that Hall could not have produced the stain. The expert determined further that Mickens' DNA pattern matched the DNA pattern in the stain on the mattress cover. The witness also stated that the approximate percentages of the population that could have deposited the stain was one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics.

The cigarette butts and certain other hairs

recovered at the crime scene also were subjected to DNA analysis (PCR type). [footnote omitted] Both Hall and Mickens had D.Q. Alpha type 1.2, 4. The expert making the comparisons determined that Mickens could not be eliminated as the source of the hairs and of the saliva on the cigarette butts. Mickens smoked cigarettes, and Hall was never known to smoke cigarettes.

Tyrone Brister testified that, when he and Mickens shared a holding cell at the courthouse on March 26, 1993, he asked Mickens why he was in the cell. Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

Mickens v. Commonwealth, 247 Va. 395, 442 S.E.2d 678, 681-83 (1994). [FN2]

FN2. The findings of fact made by the Supreme Court of Virginia are binding on this Court. See 28 U.S.C. § 2254(e)(1); Pope v. Netherland, 113 F.3d 1364, 1367 (4th Cir.), (citing Sumner v. Mata, 449 U.S. 539, 546-47, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)), cert. denied, 118 S.Ct. 16 (1997).

Following Mickens' unsuccessful appeal to the Supreme Court of Virginia, the Supreme Court of the United States remanded the case to the Supreme Court of Virginia for further consideration in light of Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (holding a capital defendant has a right to inform his sentencing jury that he is ineligible for parole). See Mickens v. Virginia, 513 U.S. 922, 115 S.Ct. 307, 130 L.Ed.2d 271 (1994). The Supreme Court of Virginia thereafter remanded the matter to the trial court for resentencing. See Mickens v. Commonwealth, 249 Va. 423, 457 S.E.2d 9 (1995).

At the resentencing proceedings, Mickens was represented by the same lawyers who had represented him at trial. The trial court conducted a new sentencing hearing before a jury. After hearing evidence in aggravation and in mitigation, the jury fixed Mickens' punishment at death, based upon both the "vileness" and the "future dangerousness" predicates of Virginia's death penalty statutes. See Mickens v. Commonwealth, 252 Va. 315, 478 S.E.2d 302 (1996), cert. denied, 520 U.S. 1269, 117 S.Ct. 2442, 138 L.Ed.2d 202 (1997). After conducting a post-trial hearing pursuant to Va.Code Ann. § 19.2-264.5 (Michie 1995), the Circuit Court of the City of Newport News followed the jury's recommendation and sentenced Mickens to death.

Mickens subsequently appealed his sentence. The Supreme Court of Virginia denied the appeal. See Mickens v. Commonwealth, 252 Va. 315, 478 S.E.2d 302, 304 (1996), cert. denied, 520 U.S. 1269, 117 S.Ct. 2442, 138 L.Ed.2d 202 (1997). Then, Mickens filed a petition for a writ of habeas corpus with the Supreme Court of Virginia. That petition was denied summarily without explanation of the reasons.

On February 24, 1998, Mickens filed a motion for the appointment of counsel to represent him in filing a federal habeas corpus petition. Counsel were appointed and Mickens filed a petition in which he raised the following grounds for relief.

II. GROUNDS FOR FEDERAL HABEAS CORPUS RELIEF

Mickens' claims are restated verbatim from his petition:

*593 1. The evidence was insufficient to convict Mr. Mickens of attempted forcible sodomy because there was no evidence adduced at trial to indicate that the intent of the attacker was to attempt to forcibly sodomize Hall, especially because the act was consummated and there was no trauma to the anus of the victim.

2. The evidence was insufficient to convict Mr. Mickens of capital murder since the evidence was insufficient to prove attempted forcible sodomy and, without the predicate offense, there can be no conviction for a capital offense.

3. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel when trial counsel failed to investigate the facts surrounding the crime, and failed to request an investigator.

4. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel due to trial counsel's failure to request a psychiatric evaluation for Petitioner's sentencing, pursuant to Ake v. Oklahoma, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) and Va.Code § 19.2- 264.3:1.

5. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel because his trial counsel labored under an actual conflict of interest which adversely affected his performance; trial counsel represented both the defendant and the victim.

6. Petitioner was denied his Fifth Amendment right to due process of law and his Sixth Amendment right to the effective assistance of counsel when the trial judge of the Newport News Juvenile and Domestic Relations Court failed to inform Petitioner of the conflict of interest and inquire of the Petitioner whether he was aware of the conflict.

7. Petitioner was denied the effective assistance of counsel when counsel failed to investigate and present the defense of consent to the charge of attempted forcible sodomy, despite the obvious indications pointing to a consent defense.

8. Petitioner was denied the effective assistance of counsel when counsel failed to present any evidence in mitigation at the sentencing hearing, and when counsel presented an unreasonable closing argument at the sentencing.

9. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel because trial counsel failed to request a mistrial when the jury found him guilty of capital murder, without finding him guilty of the underlying predicate offense, attempted forcible sodomy.

10. Petitioner was denied due process of law, and was denied the effective assistance of counsel, when he was resentenced by a jury which had not heard the evidence against him, thereby depriving the jury from considering residual doubt as a mitigating factor in determining the sentence.

11. Petitioner was denied the effective assistance of counsel by counsel's failure to effectively cross-examine crucial prosecution witnesses.

12. The refusal to excuse juror Frank Johnson for cause based solely on the juror's representations to the court denied Mickens the right to an impartial jury.

The assessment of these twelve claims must be made in perspective of certain fundamental principles which circumscribe the reach of the review of state court judgments by federal courts in habeas corpus proceedings.

*594 III. EXHAUSTION AND PROCEDURAL BAR

[1][2][3][4] The first of those principles is the doctrine of exhaustion which, simply stated, is that, "[i]n the interest of giving the

state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief." See Breard v. Pruett, 134 F.3d 615, 619 (4th Cir.1998) (citing Matthews v. Evatt, 105 F.3d 907, 910-11 (4th Cir.), cert. denied, 522 U.S. 833, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997)), cert. denied 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998). "To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court." See Matthews, 105 F.3d at 911. "Fair presentation contemplates that both the operative facts and the controlling legal principles must be presented to the state court." Id. (internal quotations omitted). Thus, in state court, the petitioner is obligated to identify the federal constitutional right purportedly infringed, identify the facts thought to support such a violation, and to explain how those facts establish a violation of his constitutional rights. Mallory v. Smith, 27 F.3d 991, 994 (4th Cir.1994). It is important to remember, therefore, that "[t]he exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition." Breard, 134 F.3d at 619.

[5][6][7] A distinct, but related, limit on the scope of habeas corpus review in federal court is the doctrine of procedural default. Pursuant to that doctrine, if a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the petitioner has procedurally defaulted his federal habeas claim in federal court. Id. at 619. A procedural default also occurs when a federal habeas petitioner has failed to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." Coleman v. Thompson, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Absent a showing of cause and prejudice or a fundamental miscarriage of justice, a federal habeas court is precluded from reviewing the merits of a defaulted claim.

Several of these procedural rules apply to the assessment of Mickens' claims. First, under the rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), a Virginia inmate is precluded from raising claims in state habeas proceedings if they could have been raised at trial and on direct appeal but were not. Under Va.Code § 8.01-654(B)(2), "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." Hoke v. Netherland, 92 F.3d 1350, 1354 n. 1 (4th Cir.1996) (internal quotations omitted). Finally, under Va.Code Ann. § 8.01-654.1 (Michie 1995), capital habeas petitioners are required to submit any habeas petition within sixty days after the Supreme Court of the United States denies a petition for a writ of certiorari.

Only Claims 1, 2, and 4 have been properly presented to the Supreme Court of Virginia. Mickens contends that the default of Claims 7 through 12 is excused because he has demonstrated cause and prejudice or a fundamental miscarriage of justice. Mickens' arguments of cause sufficient to excuse the default of Claims 7 through 12 and the assertion of actual innocence as to those claims will be addressed first. Discussion of the procedural posture of Claims 1, 2, 3, 4, 5 and 6 will be assessed along with the merits of those claims.

A. Cause Excusing Default of Claims 7

Through 12

[8][9] Claims 7 through 12 are defaulted under the principles of exhaustion and ***595** procedural bar. To demonstrate "cause" which will excuse the default of Claims 7 through 12, Mickens must establish "that some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court at the appropriate time. Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Ineffective assistance of counsel may constitute "cause" for a procedural default under certain circumstances. Id. at 488, 106 S.Ct. 2639.

A topic heading in the petition suggests that Mickens can demonstrate cause and prejudice and actual innocence which will excuse the admitted default of Claim 12. See Pet. at 10. However, Mickens fails to specify the basis for that contention in the body of the petition, as required by the Order entered April 7, 1998. Moreover, the arguments of cause put forth by Mickens in support of his Claims 7 through 11 are simply inapplicable to Claim 12. Thus, Mickens' suggestion that he can demonstrate cause and prejudice excusing his default of Claim 12 will receive no further consideration.

[10] Mickens contends that ineffective assistance of his state habeas counsel excuses the acknowledged default of Claims 7, 8, 9, 10 and 11. In support of that contention, Mickens avers by affidavit that: (1) his first communication with state habeas counsel, George B. Pavek, was when Pavek handed Mickens a completed habeas petition for signature; (2) he does not read or write at a level which would allow him to have understood the contents of that petition; (3) Pavek told Mickens that he must sign the petition that day or the court would lose authority to review his case; and (4) he "neither had any input into the contents of the [state habeas] petition, nor did he have an opportunity to review the petition." (Pet. at 52.) Under those circumstances, Mickens contends that he should not bear the consequences of Pavek's failure to raise Claims 7 through 11 in the state habeas proceedings. See Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir.1994) (refusing to find inmate's second habeas petition successive when inmate's first petition was not signed or otherwise authorized by the petitioner).

[11][12] The assertions of cause presented here by Mickens lack the legal and factual predicates to support a finding of cause. First, for an error of counsel to constitute cause, a petitioner must first possess a constitutional right to assistance of counsel. See Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A petitioner has no constitutional right to assistance of counsel in state habeas proceedings, even though claims of ineffective assistance of trial counsel can only be raised on state collateral review. See Mackall v. Angelone, 131 F.3d 442, 449 (4th Cir.1997) (en banc), cert. denied, 522 U.S. 1100, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998); Weeks v. Angelone, 176 F.3d 249, 273-74 (4th Cir.)(reiterating that the alleged ineffective assistance of habeas counsel cannot constitute cause to excuse a petitioner's defaulted ineffective assistance of trial counsel claims), cert. granted on other grounds, --- U.S. ----, 120 S.Ct. 30, 144 L.Ed.2d 833 (1999); Satcher v. Netherland, 944 F.Supp. 1222, 1263- 64 (E.D.Va.1996), rev'd on other grounds, 126 F.3d 561 (4th Cir.), cert. denied, 522 U.S. 1010, 118 S.Ct. 595, 139 L.Ed.2d 431(1997). Under the law in this circuit, there is no constitutional right to counsel on state habeas review and thus ineffective assistance of state habeas counsel (even if shown) does not constitute cause.

Secondly, Mickens' suggestion that

limitations on his literacy capacity precluded participation in the state habeas proceedings is completely lacking in merit. The record shows that Mickens could, and did, read his state habeas petition. [FN3] (State Habeas Pet. at 31.) Even if that were not so, Mickens' notarized signature, attached to his state habeas petition reflects, "I have ***596** read, and have had read to me, the foregoing petition for a writ of habeas corpus and attached motions, and papers." Id. (emphasis added). Hence, that ground for cause is rejected as entirely lacking in factual support. See Kornahrens v. Evatt, 66 F.3d 1350, 1359 (4th Cir.1995) (noting that once a court finds the absence of cause, it should not consider the issue of prejudice so as to avoid making alternative holdings).

FN3. (5/20/93 Hr. T. at 117, 139); (3/29/96 Hr. T. at 22); (1/13/99 Hr. T. at 196.)

B. Actual Innocence

[13] Initially, in his federal petition for a writ of habeas corpus, Mickens asserted that the default of Claims 7 through 11 [FN4] should be excused because "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). To pass defaulted claims through the actual innocence portal, Mickens must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. Subsequently, Mickens conceded to this Court that he had failed to present sufficient evidence to show that he was actually innocent. (10/7/98 Hr. T. at 44.) The record demonstrates the wisdom of that concession. See infra Sec. IV. For the foregoing reasons, Claims 7 through 12 are defaulted and will be dismissed.

FN4. There is no reference to actual innocence in the body of Claim 12.

IV. CLAIMS 1 AND 2: SUFFICIENCY OF THE EVIDENCE

In Claim 1, Mickens asserts that the evidence was insufficient to sustain a conviction of attempted forcible sodomy and that, absent sufficient proof of that underlying predicate offense, the conviction for the murder of Hall subsequent to the attempted forcible sodomy also must fail (Claim 2).

[14][15] A federal habeas petitioner is entitled to relief on a challenge to the sufficiency of the evidence only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In Virginia, the elements of attempted forcible sodomy include an intent forcibly to sodomize an individual and a direct, but ineffectual, act toward achievement of sodomy. See Mickens v. Commonwealth, 247 Va. 395, 442 S.E.2d 678, 687 (1994).

On direct appeal, Mickens claimed that:

> the Commonwealth failed to prove that he 'intended to commit forcible sodomy or that he did any act towards the commission of the act that amounted to the commencement of the act.' He further contends that the Commonwealth failed to prove that he was the criminal agent in Hall's death.

Id.

The Supreme Court of Virginia held that the evidence "clearly established the requisite elements of attempted forcible sodomy":

> Hall's body, naked from the waist down, was found lying face down on a mattress under an abandoned building. His legs were spread apart 12 inches. A white lubricant was on Hall's buttocks near his anus. African-American pubic hairs found on Hall's buttocks were like Mickens' pubic hairs in "all identifiable microscopic characteristics." Tissue attached to the roots of the hairs, indicating that the hairs had been forcibly removed, was consistent with Mickens' having rubbed his genitals against Hall's buttocks. Bloody "transfer" stains were evident on Hall's thighs, and a semen stain found on the mattress cover was consistent with Mickens' DNA pattern. Additionally, Mickens' statements to Officer Seals and to Tyrone Brister confirmed that Mickens had attempted to commit forcible sodomy.

Id. at 688; see Wilson v. Greene, 155 F.3d 396 406-7 (4th Cir.) (rejecting similar challenges ***597** to sufficiency of the evidence for attempted rape), cert. denied, --- U.S. ----, 119 S.Ct. 536, 142 L.Ed.2d 441 (1998).

[16] In his federal petition, Mickens suggests, for the first time, that the evidence was insufficient to sustain that conviction because the evidence failed to show that "Mr. Hall was subjected to any sexual activity against his will, by threat, force or intimidation [and, according to Mickens] ... the evidence indicated that Mr. Hall went to the location voluntarily." (Pet. at 15.) That theory is defaulted because it has never been presented previously to the state courts. Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir.), cert. denied, 522 U.S. 833, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997).

[17] Moreover, the theory ignores the fact that Hall exhibited bruises on the front of his neck, that he sustained multiple stab wounds, and that there was a transfer stain on the back of his thighs. [FN5] (5/26/93 Tr. T. at 509- 10.) The bruises on Hall's neck and the stab wounds are consistent with use of a choke hold and a knife, both of which are indicia of the use of force. And, the transfer stains on the back of Hall's thighs indicate that the killer was stabbing Hall from behind while attempting to sodomize Hall, or before having done so. That evidence forecloses the possibility that any rational finder of fact could conclude that Hall was engaging in consensual sexual activity immediately before his death. For the foregoing reasons, Claims 1 and 2 will be dismissed.

FN5. Bloody "transfer" stains occur when an object comes into contact with blood and thereafter comes in contact with another surface, thereby leaving a stain on that other surface.

V. CLAIMS 3 AND 4: ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

In Claims 3 and 4, Mickens contends that he was denied effective representation by trial counsels' inadequate pretrial investigation (Claim 3) and by trial counsels' failure to request a psychiatric evaluation for sentencing (Claim 4).

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court held that to demonstrate the ineffective assistance of counsel, a defendant first must show that counsel's representation was deficient and, then, must establish that the deficient performance prejudiced the defense. Id. at 687, 104 S.Ct. 2052. At bottom, in assessing prejudice, it is important to focus on "whether the result of the proceeding was fundamentally unfair or unreliable." Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

[18] The deficient performance facet of the Strickland test "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment." 466 U.S. at 688, 104 S.Ct. 2052. To satisfy this facet of Strickland, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88, 104 S.Ct. 2052. The standard for deficient performance is "not merely below average performance; rather, the attorney's actions must fall below the wide range of professionally competent performance." Griffin v. Warden, Maryland Correctional Adjustment Center, 970 F.2d 1355, 1357 (4th Cir.1992). Furthermore, in order to avoid the distorting effects of hindsight, a court, on federal habeas review, is required to evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. 2052. Finally, the defendant must overcome the "strong presumption ... that, under the circumstances, the challenged action, 'might be considered sound trial strategy' " (if, of course, the challenged action was a matter of trial strategy). Id. at 689, 104 S.Ct. 2052 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). With these principles in mind, it ***598** is appropriate to assess the arguments made by Mickens in Claims 3 and 4.

A. Pretrial Investigation (Claim 3)

[19] In state court, Mickens alleged that trial counsel were ineffective for failing to request the appointment of a criminal investigator, which "prevented the petitioner from developing and investigating any issues or facts that may have pointed to the fact that someone else may have been involved." (State Habeas Petition at 23, 27-8.) (emphasis added). In Claim 3 of this federal petition, Mickens asserts that he was denied the effective assistance of counsel because trial counsel: (1) failed to investigate a consent defense; and (2) failed to request an investigator to gather evidence to support a consent defense or to gather mitigating evidence. The record shows that Mickens has never given the Virginia courts a fair opportunity to evaluate the adequacy of counsels' investigation or their failure to request the appointment of an investigator to explore evidence of consent and mitigating circumstances. Claim 3, therefore, is defaulted and will be dismissed. [FN6]

> FN6. Additionally, Claim 3 lacks substantive merit. In light of the facts facing counsel, see infra Sec. VI(E)(1), counsel reasonably chose not to pursue a consent defense. Furthermore, the lack of mitigating evidence is attributable to absence of such evidence rather than the failings of counsel.

B. Psychiatric Examination (Claim 4)

[20] In Claim 4, Mickens contends that trial counsel were deficient for failing to request a psychiatric examination of petitioner for purposes of sentencing. Mickens suggests that, if trial counsel had requested such an examination, the expert could have testified that Mickens had sustained organic brain damage and therefore had a diminished mental capacity. That evidence would have been mitigating of the offense, says Mickens. The challenge to the performance of trial counsel on this ground is "a product of hindsight and fails to address the facts reasonably relied upon by counsel at the time [of trial and sentencing]." Roach v. Martin, 757 F.2d 1463, 1478 (4th Cir.1985).

For instance, before trial, one of Mickens' trial counsel, Bryan Saunders, asked the court to have Mickens evaluated for competence to stand trial and for sanity at the time of the offense. (Resp.'s Mot. to Dis. Ex. C. at ¶ 7.) Pursuant to that request, the court appointed Dr. Killian to conduct evaluations of Mickens. Dr. Killian determined that Mickens was sane at the time of the offense and that he was competent to stand trial. Id. Counsel's performance cannot be faulted on that issue.

Also, in preparation for the penalty phase, trial counsel reviewed Mickens' prison file. Id. at ¶ 8. The file contained a notation which indicated that Mickens may have organic brain damage as a result of sniffing inhalants. [FN7] Id. Saunders conveyed that information to Dr. Killian and asked him whether there was anything in his examinations that would confirm the notation. Id. Dr. Killian told Saunders that "he did not have any reason to suspect any problem of brain damage," but he offered to test Mickens. Id. Therefore, arrangements were made to transport Mickens for testing, but Mickens refused to take the test. Id. Nonetheless, at his first sentencing, Mickens presented evidence, through his testimony and that of his mother, which suggested his aberrant behavior was linked to his history of having sniffed glue.

> FN7. The trial transcripts reflect that Mickens was lucid and rational. Mickens does not assert that trial counsel were aware of any other evidence which would cause them to doubt his mental condition.

[21] To have been effective, counsel was not required to second guess Dr. Killian's conclusion or to devote additional time pursuing what appeared to have been an unfruitful line of investigation. Wilson v. Greene, 155 F.3d 396, 403 (4th Cir.), cert. ***599** denied, 119 S.Ct. 536, 119 S.Ct. 536, 142 L.Ed.2d 441 (1998). Moreover, "there is no constitutional basis for a rule that would require a psychiatric evaluation in every capital case." Clanton v. Bair, 826 F.2d 1354, 1358 (4th Cir.1987). Thus, "when a seemingly lucid and rational client rejects the suggestion of a psychiatric evaluation and there is no indication of a mental or emotional problem, a trial lawyer may reasonably forego insistence upon an examination." Id. In this instance, trial counsel were assured by both Mickens' conduct and a mental health expert that significant mitigating evidence pertaining to organic brain damage simply was not available. Under such circumstances, counsel reasonably chose not to insist on further mental evaluations.

Finally, although it was reasonable initially to have cast Mickens' purported inhalant induced mental infirmity into the mix of mitigating evidence, an extended defense focused on that issue was unlikely to have been of benefit to Mickens because "[m]ental health evidence like that of [a petitioner's] organic brain dysfunction is a double-edged sword that might as easily have condemned [petitioner] to death as excused his actions." Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir.1998). Here, the mitigating value of such evidence (had it been offered) would have been obscured by the fact that Mickens' purported mental infirmity was caused by sniffing glue and that Mickens continued to abuse inhalants while incarcerated. For the foregoing reasons, Claim 4 will be dismissed.

VI. CLAIMS 5 AND 6: CONFLICT OF INTEREST

In Claim 5, Mickens contends that he was denied effective assistance of counsel because his lead trial counsel, Bryan Saunders, was representing the victim, Timothy Hall, at the time of Hall's murder. In Claim 6, Mickens makes the related claim that the failure of the Newport News Juvenile and Domestic Relations Court (hereinafter "JDR Court") to inquire into the conflict denied him due process and effective assistance of counsel. The procedural

history pertinent to these claims is set forth below (and it is undisputed):

. On February 21, 1992, Janet Heywood, Timothy Hall's mother, swore out a warrant for assault and battery against her son. Heywood alleged that, on February 16, 1992, Hall grabbed her by the arms and shoved her to the ground.

. On or about March 13, 1992, Timothy Hall was charged by Newport News police with possession of a concealed weapon (a serrated bread knife wrapped in paper). Hall was directed to appear before the JDR Court for the assault and concealed weapons charges on March 20, 1992.

. At the March 20, 1992 hearing, Substitute Judge Paul Criver, Jr., of the JDR Court appointed Bryan Saunders to represent Hall and the hearing was continued until April 3, 1992.

. Sometime between March 20 and March 28, 1992, Hall came to Saunders' office for an interview which lasted fifteen to thirty-minutes. (1/13/93 Hr. T. at 98.) [FN8] The discussion was confined to the circumstances surrounding each of the charged crimes. (12/23/98 Dep. at 11-26.)

FN8. On January 13, 1999, this Court conducted an evidentiary hearing on Claims 5 and 6. Citations to the record of that hearing will be abbreviated as "1/13/99 Hr. T." Also, Mickens has tendered a copy of the transcript of Saunders' deposition conducted on December 23, 1998. Citations to that record will be abbreviated as "12/23/98 Dep."

. On March 28, 1992, Hall was seen alive for the last time.

. On March 30, 1992, Hall's body was discovered.

. On April 3, 1992, Judge Foster of the JDR Court removed the charges against Hall from the docket and dismissed them, noting that the defendant is deceased.

***600** On the same date, Saunders appeared at the JDR court for a hearing on Hall's assault and concealed weapons charges. (1/13/99 Hr. T. at 96-97.) Someone (the identity of whom Saunders does not recall) told Saunders that Hall was dead and that the pending cases had been dismissed. Id. at 97.

. On April 4, 1992, Mickens was arrested.

. On April 6, 1992, Judge Foster of the JDR Court appointed Saunders to represent Mickens.

It is undisputed that Mickens was unaware of Saunders' previous representation of Hall until federal habeas corpus proceedings were initiated. Even then, the discovery of these facts was purely fortuitous. In particular, Mickens' federal habeas counsel visited the JDR Court to review Mickens' JDR file. Counsel asked the clerk on duty for any files involving Timothy Hall. Of course, files of a juvenile are confidential and should not have been produced without a court order. See Virginia Code Ann. § 16.1-305 (Michie 1996). Nonetheless, a clerk of the JDR Court inadvertently produced Hall's file on the assault and concealed weapons charges. It was then that federal habeas counsel discovered that Saunders previously had represented Hall and requested a copy of the files. The clerk's supervisor intervened, discovered that Hall's file had been improperly disclosed and refused to allow counsel any further access to Hall's files. Subsequently, Hall's files were produced to Mickens' counsel by judicial process.

[22] The Respondent has moved to dismiss Claims 5 and 6 on the ground that they are procedurally barred because they were not presented in Mickens' first state habeas petition. See Va.Code. §§ 8.01-654(B)(2) [FN9]; 8.01-654.1. [FN10] Mickens counters that, in establishing a conflict of interest on the part of Saunders, he has shown cause and prejudice excusing the

default.

FN9. Under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." Hoke v. Netherland, 92 F.3d 1350, 1354 n. 1 (4th Cir.1996) (citing 8.01-654(B)(2)). Whether this claim was reasonably available will be considered as part of the discussion of cause and prejudice (see pp. 600-01 infra).

FN10. Va.Code § 8.01-654.1 requires capital defendants to file a habeas petition within sixty days of the denial of his petition for certiorari. The last paragraph of that section provides, "notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus, an indigent prisoner may file such a petition within 120 days following appointment, made under § 19.2-163.7, of counsel to represent him." Neither Mickens nor Greene suggests this sentence provides Mickens with an opportunity to file another habeas petition with the Supreme Court of Virginia. Cf. Graham v. Angelone, No. 99-4, 191 F.3d 447, 1999 WL 710385, at *10 (4th Cir. Sept.13, 1999) (refusing to extend time for filing capital state habeas petition when new counsel appointed shortly before the deadline).

A. Cause Excusing Default of Claims 5 and 6

[23][24] Mickens contends that he has satisfied the cause requirement because the facts supporting the conflict of interest claim were "not reasonably available" before the completion of his state proceedings. McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). "The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition." Barnes v. Thompson, 58 F.3d 971, 975 (4th Cir.1995). Here, Saunders' silence and state law requirements for secrecy of juvenile court records operated together to preclude Mickens from raising the conflict of interest claims in his state habeas petition.

It is undisputed that Mickens did not know of the conflict of interest here asserted. And, there were only two sources ***601** from which Mickens could have discovered that Saunders had represented Hall before representing Mickens: Saunders and the Newport News JDR Court. Saunders kept silent, thereby breaching his duty of disclosure. State law foreclosed any access to the JDR Court. On this record, Mickens' failure to explore either of these sources before completion of his state habeas proceedings cannot be characterized as unreasonable.

[25] Because the primary responsibility for discerning conflicts of interests and revealing them to clients and to the courts rests with counsel, Saunders' silence impliedly assured Mickens that there were no potential conflicts from the representation of any previous clients See Cuyler v. Sullivan, 446 U.S. 335, 346, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly if a conflict of interest arises during the course of a trial." Id. Whether a lawyer can represent multiple or successive clients is circumscribed by the lawyer's inescapable

duty to "explain any circumstances that might cause a client to question his undivided loyalty." Va.Code of Professional Responsibility EC 5-19 (Michie 1992). Saunders' representation of the murder victim, at the time of the murder, is undoubtedly a circumstance "that might cause a client to question his undivided loyalty." Id.

Therefore, Saunders was obligated either to have declined appointment to the Mickens' case, or to have fully disclosed to Mickens the fact of his previous representation of Hall and the possible effects that his previous representation of Hall might have on his ability to represent Mickens. Dowell v. Commonwealth, 3 Va.App. 555, 351 S.E.2d 915, 917-18 (1987). And, the full disclosure option also obligated Saunders to explain that Mickens' consent would be required before Saunders could continue the representation. See Va.Code of Professional Responsibility DR 5-105; EC 5-15; EC 5-17; EC 5-19.

Saunders also was required to have disclosed the previous representation to the appointing court and that would have meant that the facts surrounding the previous representation would have been fully explained on the record. In other words, Saunders' representation would have been permitted only after a full inquiry. See Wood v. Georgia, 450 U.S. 261, 272, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); Cuyler v. Sullivan, 446 U.S. 335, 346-47, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Holloway v. Arkansas, 435 U.S. 475, 485, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Kirkpatrick v. Butler, 870 F.2d 276, 284 (5th Cir.1989); Edmonds v. Jabe, 874 F.Supp. 730, 736 (W.D.Va.1995) (finding conflict of interest claim was not reasonably available when only mention of conflict was in a single sentence buried in a psychiatric report prepared for sentencing). Considering Saunders' silence in the face of these duties and the absence of any indication in the trial record that a conflict might have existed, Mickens had no reason to even consider the possibility that a conflict existed. See Edmonds, 874 F.Supp. at 736. Furthermore, his state habeas counsel had no reason to explore the matter.

Nonetheless, and without any credible decisional support, the Commonwealth persists in asserting that Claims 5 and 6 were reasonably available to state habeas counsel because federal habeas counsel discovered the factual basis of the claim. It is charitable to call that argument frivolous because the fortuitous circumstances by which federal habeas counsel discovered the truth about Saunders' conflict prove beyond question that Mickens did not fail in his duty to inquire in the state court proceedings. See Amadeo v. Zant, 486 U.S. 214, 224, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). Mickens had no reason to suspect that Saunders would violate the disclosure obligations imposed on him by state law. Nor is there fault to be found in state habeas counsel's failure to request Hall's JDR files because they were imbued with confidentiality by state law. Federal ***602** habeas counsel uncovered the conflict by virtue of the error of the Clerk of the JDR Court. And, when that error was discovered, the records were taken from federal habeas counsel. They were disgorged again only by virtue of a subpoena. Thus, the factual predicate for Claims 5 and 6 simply was not available to Mickens in state court nor was it discoverable through the exercise of diligent investigation. To argue otherwise is disingenuous. On this record, Mickens has established cause, the first step for excusing his default of Claims 5 and 6.

B. Prejudice Excusing Default of Claims 5 and 6

[26] To establish actual prejudice, Mickens "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Where the defaulted claim involves an actual conflict of interest on the part of counsel, the prejudice inquiry incorporates the test for establishing the underlying claim. See Williams v. French, 146 F.3d 203, 210-13 (4th Cir.1998), cert. denied, 525 U.S. 1155, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999). Thus, it is necessary now to evaluate the underlying claims.

C. The Test For Establishing An Actual Conflict of Interest

[27] To demonstrate that he was deprived of the Sixth Amendment right to conflict-free counsel, Mickens can proceed on one of two theories: (A) that Saunders had a potential conflict of interest that prejudiced his defense, see Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); or (B) that "[1] an actual conflict of interest [2] adversely affected his lawyer's performance" Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). See Enoch v. Gramley, 70 F.3d 1490, 1496 (7th Cir.1995); United States v. Swartz, 975 F.2d 1042, 1047 (4th Cir.1992). Mickens proceeds on the latter theory.

1. Actual Conflict

[28][29] In the context of multiple or simultaneous representations, a lawyer has an actual, as opposed to a potential, conflict of interest when the interest of the petitioner and the other client "diverge[d] with respect to a material factual or legal issue or to a course of action." [FN11] Gilbert v. Moore, 134 F.3d 642, 652 (4th Cir.) (quoting Cuyler v. Sullivan, 446 U.S. 335, 356 n. 3, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (Marshall, J., concurring in part and dissenting in part)), cert. denied, 119 S.Ct. 103 (1998). It is often difficult to ascertain whether the clients' interests actually diverged in the context of successive representation. Freund v. Butterworth, 165 F.3d 839, 859 (11th Cir.) (en banc), cert. denied, --- U.S. ----, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999); United States v. Tatum, 943 F.2d 370, 376 (4th Cir.1991); United States v. Young, 644 F.2d 1008, 1012 (4th Cir.1981).

> FN11. A potential conflict of interest exists if the interests of the defendant may place the lawyer under inconsistent duties at some time in the future. Cuyler, 446 U.S. at 356, n. 3, 100 S.Ct. 1708.

Keenly aware of the delicate privilege issues which often arise in successive representation cases, the Eleventh Circuit has adopted a refined version of the Cuyler test specifically for that sort of case. See Smith v. White, 815 F.2d 1401, 1406 (11th Cir.1987). [FN12] The test is discussed at length in the Eleventh Circuit's recent decision in Freund v. Butterworth, 165 F.3d 839 (11th Cir.) (en banc), cert. denied, --- U.S. ----, ***603** 120 S.Ct. 57, 145 L.Ed.2d 50 (1999). In Freund, the court held that, in the context of successive representation, a defendant does not demonstrate a disqualifying divergence of interests unless he shows either that "(1) counsel's earlier representation ... was substantially and particularly related to counsel's later representation of petitioner, or (2) counsel actually learned particular confidential information during the prior representation ... that was relevant to petitioner's later case." Freund, 165 F.3d at 859 (internal quotations and citations omitted). "Even proof of both substantial relatedness and confidential information, however, may not necessarily

be enough to demonstrate 'inconsistent interests' in a successive representation case." Id. The situation may require the defendant to introduce, "other proof of inconsistent interests." Id. (quoting Smith, 815 F.2d at 1406).

> FN12. The United States Court of Appeals for the Seventh Circuit has adopted the Smith test for successive representation cases. See Enoch v. Gramley, 70 F.3d 1490, 1496 (7th Cir.1995). This opinion refers to that test as the "Freund test".

The two scenarios described in the Freund test pose the most obvious risks of an actual conflict in the context of successive representation. See United States v. Kliti, 156 F.3d 150, 154 (2d Cir.1998); United States v. Young, 644 F.2d 1008, 1012 (4th Cir.1981). However, neither the Supreme Court nor the Fourth Circuit has restricted proof of a conflict to those two scenarios. See, United States v. Magini, 973 F.2d 261, 263-64 (4th Cir.1992) (directing district court to hold an evidentiary hearing to determine whether client's and lawyer's pecuniary interests diverged). Given the gravity of the charge against Mickens and the somewhat predictable consequence of rejecting his petition, it is imperative that, through "other proof of inconsistent interests," Mickens can carry his burden under the first prong of Cuyler, if the interests actually diverged. In this instance, Mickens argues that Saunders' irreconcilable ethical obligations to Hall and Mickens coupled with Saunders' desire to conceal the successive representation constitute "other proof of inconsistent interests". See infra Sec. VI(D)(2).

2. Adverse Effect

[30] Mickens erroneously contends that an adverse effect can be established simply by showing that "but for the attorney's actual conflict of interest, there is 'a reasonable likelihood that counsel's performance somehow would have been different.' " Stoia v. United States, 22 F.3d 766, 771 (7th Cir.1994) (quoting Frazer v. United States, 18 F.3d 778, 787 (9th Cir.1994) (Beezer, J., concurring)). In fact, a petitioner must demonstrate that counsel's performance was adversely affected by the conflict. Stoia, 22 F.3d at 771 (noting the lapse in counsel's performance must be "contrary to the defendant's interests"). Thus, even though the petitioner is not required to demonstrate prejudice, he must show that the conflict was "deleterious" or "harm[ful]" to counsel's advocacy. See Burger v. Kemp, 483 U.S. 776, 785, 788, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). A petitioner satisfies the second facet of Cuyler "if the attorney took action on behalf of one client that was necessarily adverse to the defense of the other or failed to take action on behalf of one because it would adversely affect the other." Williams v. French, 146 F.3d 203, 212 (4th Cir.1998), cert. denied, 525 U.S. 1155, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999).

[31] To prove an adverse effect, a petitioner must satisfy three elements:

> First, he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the petitioner need not show that the defense would necessarily have been successful if the alternative strategy or tactic had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must ***604** establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

Freund, 165 F.3d at 860. Accord Williams, 146 F.3d at 213 (requiring similar elements for demonstrating adverse effect in the context of multiple representation); United States v. Tatum, 943 F.2d 370, 376 (4th Cir.1991).

These basic principles inform the analysis of the conflict of interest claims advanced by Mickens.

D. Proof Of An Actual Conflict

[32] The Freund test, with the modification that Mickens may establish an actual conflict solely through "proof of other inconsistent interests," will be applied to assess the merits of Mickens' claims. At this stage of the analysis, it is insufficient for Mickens merely to suggest what might have animated Saunders' conduct. Mickens must demonstrate, from the state court record and the evidence adduced in these proceedings, that an actual conflict of interest adversely affected Saunders' representation.

Mickens contends that he has proven the existence of actual conflict because: (1) Saunders' representation of Hall was substantially and particularly related to Saunders' later representation of Mickens; (2) Saunders' ethical duty of loyalty to Hall, and Saunders' own self-interest were irreconcilable with his duty to zealously represent Mickens; and (3) Saunders' actually learned particular confidential information during his representation of Hall that was relevant to Mickens' case. See Freund v. Butterworth, 165 F.3d 839, 859 (11th Cir.) (en banc), cert. denied, --- U.S. ---, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999).

1. Substantial Relatedness

[33] Substantial relatedness exists when " 'the present action and the past representation concern the very same subject matter' " or when the prior representation concerned the " 'same criminal transactions' and 'same events' at issue in defendant's case". Freund v. Butterworth, 165 F.3d 839, 864 (11th Cir.) (en banc) (quoting Kraft, Inc. v. Alton Box Board Inc., 659 F.2d 1341, 1345 (1981) and United States v. Martinez, 630 F.2d 361, 362 (5th Cir.1980)), cert. denied, 120 S.Ct. 57, 68 U.S.L.W. 3223 (Oct. 4, 1999). Saunders' representation of Hall was very limited in scope and duration. Specifically, Saunders represented Hall on a concealed weapons charge and an assault on his mother. The representation did not arise out of the "very same subject matter" as the charges facing Mickens. Nor did it involve the same criminal transactions or events. Mickens strains to find a correlation by arguing that the location of Hall's arrest for the concealed weapon charge indicates that he was a prostitute and thus consented to the sexual activity with Mickens. [FN13] (Pet.'s Resp. to Feb. 2 1999 Order at 22.) Hall's arrest, within a mile or so of his residence, even if it was in a high crime area, does not suggest that he was a prostitute, much less that he consented to have sex with Mickens. (5/26/93 Tr. T. at 562; 1/13/99 Hr. T. at 201.) Mickens also contends that "[b]y its very nature the previous representation of the murder victim is substantially related to the defense of the person accused of the murder." (Pet.'s Resp. to Feb. 2, 1999 Order at 13.) The weight of authority refutes that contention. See Crisp v. Duckworth, 743 F.2d 580, 588 (7th Cir.1984) (finding no conflict when defense counsel previously represented murder victim in unrelated criminal action); Kirkpatrick v. Butler, 870 F.2d 276, 284 (5th Cir.1989) (finding no conflict ***605** where defense counsel had friendship with, and had in the past represented, members of murder victim's family); Moseley v. Scully, 908 F.Supp. 1120 (E.D.N.Y.1995) (finding no actual

conflict where counsel previously represented murder victim on unrelated charges); Dixson v. Quarles, 627 F.Supp. 50 (E.D.Mich.) (finding no actual conflict even though defense counsel previously represented the murder victim), aff'd 781 F.2d 534, 535 (6th Cir.1985). Mickens has failed to demonstrate a correlation, much less a substantial and particular relationship, between Saunders' representation of Hall for assault and possession of a concealed weapon and his representation of Mickens on attempted forcible sodomy and capital murder charges.

FN13. Hall was charged with carrying a concealed weapon at 27th and Marshall streets in Newport News. (Probable Cause Statement, United States District Court Clerk's Record # 23.) The arrest warrant for the charge listed Hall's address at 83-28th Street, # D-4, Newport News, Virginia. The evidence does not indicate that the intersection of 27th and Marshal streets was an area frequented by prostitutes.

2. Divergent Ethical Interests

[34][35] Mickens next argues that Saunders' ethical duties, and his desire to conceal the breaches of those duties, left Saunders hopelessly adrift in a fog of torn and conflicting loyalties. See United States v. Tatum, 943 F.2d 370, 377 (4th Cir.1991). Mickens contends that the determination whether there was an actual conflict under the Sixth Amendment is "inextricably intertwined" with an analysis of Saunders' ethical duties and the breach of those duties. Certainly prevailing norms of practice, as reflected in the state codes of professional responsibility, are useful guides for evaluating the ethical obligations of counsel and how a competent lawyer must resolve potential conflicts. See Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). At the threshold, it is now settled that "[t]he effective performance of counsel requires meaningful compliance with the duty of loyalty and the duty to avoid conflict of interests can lead to ineffective representation." Tatum, 943 F.2d at 375. However, the "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." Nix v. Whiteside, 475 U.S. 157, 165, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986); see Lightbourne v. Dugger, 829 F.2d 1012, 1023 n. 12 (11th Cir.1987). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler, 446 U.S. at 350, 100 S.Ct. 1708 (emphasis added).

When Saunders was appointed to represent Mickens in the capital murder of Hall, Saunders was obligated to consider the ethical problems posed by the appointment because Saunders' duty to zealously represent Mickens might be compromised by his loyalty to Hall, including his obligation to preserve Hall's secrets and confidences. See Va.Code Prof'l Responsibility DR 4-101, EC 4-6, Canon 7 (Michie 1992). [FN14] Moreover, even if Saunders did not believe that the representation would ripen into an actual conflict of interest, the choice was not his alone. Id. EC 5-19. Mickens contends that his interests were further compromised by Saunders' attempts to conceal his ethical breaches. However, the evidence shows that, regrettably, Saunders never struggled with the ethical issues envisioned by Mickens. (1/13/99 Hr. Tr. at 220, 228.)

FN14. Under Virginia law, even the fact that there had been juvenile charges against Hall as well as the information in the charging documents arguably constituted confidential information. See Virginia Code Ann. § 16.1-305 (Michie Supp.1992).

To begin, the record here reflects that, as far as Saunders was concerned, his allegiance to Hall, "[e]nded when I walked in the courtroom and they told me he was dead and the case was gone." (1/13/99 Hr. Tr. at 156-7, 218). As Mickens' counsel, Saunders coldly viewed Hall not as former client, but rather as "a demographic situation which was disastrous as far as Mickens was concerned." Id. at 156. That view is remarkably wrong given that Saunders was obligated to preserve any confidence obtained from Hall. Swidler & Berlin v. United States, 524 U.S. 399, 118 S.Ct. 2081, 2086, 141 L.Ed.2d 379 (1998).

***606** However, Saunders testified that his representation of Mickens was not hampered by the duty to preserve Hall's purported confidences. Of course, for purposes of the issue under consideration, the court "accords great weight to a lawyer's perception of a conflict," because it is tasked with evaluating what considerations actually animated Saunders' actions, rather than what obligations should have influenced his actions. United States v. Young, 644 F.2d 1008, 1014 (4th Cir.1981). Thus, whether particular information is confidential under Virginia law while important, is not dispositive of whether Saunders deemed the information to be confidential.

According to Saunders, he did not perceive that his previous representation of Hall presented an actual conflict in representing Mickens. (1/13/99 Hr. T. at 108-11, 214, 223, 228; 12/23/98 Dep. at 86.) That perception was animated by Saunders' conclusion that he did not obtain any confidential information from Hall (1/13/99 Hr. T. at 218-19), and that "[n]othing I knew or did or had anything to do with Mr. Hall had anything to do with [Mickens'] case." Id. at 228. Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court concludes that, as a factual matter, Saunders did not believe that any "continuing duties to [a] former client[ ] [might] interfere with his consideration of all facts and options for his current client." United States v. Tatum, 943 F.2d 370, 376 (4th Cir.1991).

3. Relevant Confidential Information

Although it is inconceivable that Saunders obtained no confidential information from Hall, (1/13/99 Hr. T. at 219), the record here confirms that Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing. Freund v. Butterworth, 165 F.3d 839, 865 (11th Cir.) (en banc), cert. denied, --- U.S. ----, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999). Saunders met with Hall on one occasion for a total of fifteen to thirty minutes. (1/13/99 Hr. T. at 98.) Through his representation of Hall, Saunders learned that: (a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault, but she was not interested in prosecuting the case (1/13/99 Hr. T. at 155); and (c) Hall was not living with his mother at the time of his death. As discussed fully below, that information was irrelevant to Mickens' defense. [FN15]

FN15. For example, Hall's criminal history might have had some relevance to Mickens' case, if Mickens' testimony had not foreclosed any theory of self-defense.

E. Adverse Effect: The Purported Manifestation of the Conflict

Mickens asserts that Saunders' conflict caused: (1) his failure to raise a consent defense; (2) the failure to investigate or raise any negative information about Hall; (3) the failure to engage in meaningful plea negotiations; and (4) the failure to apprise the sentencing court of Hall's pending charges or his strained relationship with his mother. [FN16] Each of these will be measured against the Freund test for ascertainment of an adverse effect (see p. 603-04 supra).

FN16. By Order entered February 2, 1999, the Court stated, "[r]eview of the adverse affect prong, for the habeas petition will be limited to instances listed" "in separately numbered paragraphs" in the brief in response to that Order. Accordingly, the Court deems Mickens to have abandoned claims of adverse affect alleged in the initial petition but not realleged in the response to the February 2, 1999 Order.

1. Consent Defense

Mickens asserts that the conflict foreclosed presentation of the defense that Hall was killed during a sexual encounter to which he had consented. That defense, ***607** if successful, would have precluded capital punishment. Mickens points to the following facts that made consent a plausible defense strategy: (a) there were no "defensive" stab wounds; [FN17] (b) there was no evidence that Hall was forced to the secluded area where he was found; (c) there were rumors that Hall was a male prostitute and that the area where Hall's body was found was a known gathering place for homosexuals; (d) there was no blood mixed with Mickens' semen stain on the mattress; and (e) the mattress where Hall's body was found had been used for sexual activity in the past.

FN17. Leah Bush, the medical examiner testified that,

> [d]efense wounds are to areas of the body in a person who sees the injury coming and raises a portion of the body in a protective manner.... Oftentimes, the backs of the arms of or hand or in a case of a sexual or rape-type of assault also present [sic] on the legs if the victim were to raise up their knees to ward off a blow or attack.

(5/26/93 Tr. T. at 510.)

Even if it is assumed that those five facts would have supported a consent defense, the record shows that other facts foreclosed presentation of consent as a plausible alternative defense strategy. First, Saunders knew that there also was evidence that Hall sometimes went to the area where he was murdered simply to watch the water. (1/13/99 Hr. T. at 174, 205; 12/23/98 Dep. at 71.) Second, there were blue marks on Hall's neck which evinced use of a choke hold on Hall, a circumstance inconsistent with consent. (8/20/93 Hr. Tr. at 25; 12/23/98 Dep. at 70.) Third, the bloody transfer stains on the back of Hall's thighs indicated that the attacker stabbed Hall before or during the attempted sexual activity, thereby making consent a rather implausible alternative theory. As Keeling, Mickens' other counsel, remarked, "I would imagine that when the choking of the victim or the stabbing of the victim started happening that [any] consent would have been revoked." (1/13/99 Hr. T. at 33.) Finally, and most importantly, Mickens never suggested that consent was a viable line of defense (12/23/98 Dep. at 67, 68, 73). To the contrary, Mickens repeatedly professed that he had no involvement with Hall in any way. That persistent representation by Mickens encouraged Saunders to conclude that a consent defense did not exist. (1/13/99 Hr. Tr. at 68-70, 77).

Mickens repeatedly informed counsel that he did not even know Hall and that he had nothing to do with the crime. (6/2/93 Tr. T. at 885; 8/20/93 Hr. Tr. at 12, 37; 1/13/99 Hr. Tr. at 77, 89, 135, 183.) And, Mickens insisted on testifying to that effect at his trial and at sentencing. (1/13/99 Hr. Tr. at 69, 224.) Hence, Saunders was compelled to construct a defense that distanced Mickens from Hall and the murder scene. Id. at 77-78, 84. Saunders discarded consent as a strategy not because of any loyalty to Hall, but because neither the facts nor Mickens' testimony was compatible with such a strategy. [FN18] Id. at 68, 156-57, 231. An adverse effect cannot be found where a lawyer relies on what his client has told him and that reliance forecloses a line of defense. See Royal v. Taylor, 188 F.3d 239, 248-49 (4th Cir.1999) (citing Barnes v. Thompson, 58 F.3d 971, 979 (4th Cir.1995)); Parker v. Parratt, 662 F.2d 479, 484 (8th Cir.1981) (concluding defense counsel could not be blamed for offering the defense sworn to by both defendants).

FN18. At the evidentiary hearing, Keeling explained that he never raised the issue of consent with Mickens because Mickens insisted that he was not involved in the crime. (1/13/99 Hr. T. at 68.)

2. Failure to Ascertain and Use Information About Hall

Mickens asserts that an adverse effect of Saunders' conflict is manifest in his failure to investigate and to use negative information about Hall. This alternative defense strategy is based on the premise that negative information about the victim of a crime can be, and often is, used to mitigate the severity of the act of murder.

***608** Of course, adoption of that alternative strategy would have been inconsistent with Mickens' profession of innocence and his purported regret at Hall's passing. "I'll pray each and every day that [Hall] may rest in peace." (6/4/93 Hr. T. at 1090 (sentencing hearing)). Saunders carried that standard during his closing argument, emphasizing the sanctity of human life and expressing regret for Hall's death. (2/7/96 Hr. T. at 479-80; 1/13/99 Hr. T. at 157.) Saunders eschewed an attack on Hall, the young victim of a horrible crime, because it would have appeared disingenuous and would have diminished the value of Mickens' life in the eyes of the jury. (1/13/99 Hr. T. at 112, 156-58; 12/23/98 Dep. at 76, 77).

Mickens' papers do not outline the precise contours of this alternative strategy, but it appears to be based on the premise that investigation would have shown that Hall was a neer-do-well, male prostitute who had been charged with carrying a weapon and assaulting his own mother. However, the record offers no support for the existence of evidence which would have made that strategy either plausible or viable. Even diligent investigation by federal habeas counsel has uncovered nothing but rumor about Hall's supposed life as a male prostitute. But, even if that could have been proved, evidence on that point would be useful only by mounting a consent defense which was foreclosed by Mickens' insistance that he did not even know Hall or by pointing to another perpetrator, for which there was no admissible support either. The propensity of that approach to backfire made it an unreasonable alternate strategy or tactic at sentencing.

The evidence that Hall had been charged with carrying a weapon had no utility as an alternate strategy, even if it were admissible (which is highly doubtful). The evidence that Hall had been charged with assaulting his mother would have been useful insofar as it could be argued to discredit the mother's

professions of grief tendered to the probation officer for inclusion in the victim impact statement. Of course, that approach was fought with the risk of unintended consequences as well. In any event, even though admissible for impeachment, evidence on that point cannot be considered to present a plausible or viable alternate strategy because the assault was of a relatively minor nature and its impeaching effect would be de minimus.

Even if the negative information about Hall could be considered as raising a plausible, viable strategy, the record here dispels the contention that the failure to use negative information about Hall is attributable to any conflict of interest on the part of Saunders. This is particularly evident in the conduct of Saunders' co-counsel, Warren Keeling, who was in charge of the sentencing phase of Mickens' trial. (1/13/99 Hr. T. at 78.) In preparation for the trial, Keeling read the newspaper article, (Pet.Ex. 1, attached to initial federal petition), which reported that Hall had been charged with assaulting his mother; that the police had "picked him up" carrying a weapon; that Hall had been kicked out of his mother's house; and that a social worker was involved in Hall's life. (1/13/99 Hr. T. at 61.) At the time, Keeling was looking for evidence about Hall that could be used at Mickens' sentencing. Id. at 57. Keeling did not deem any of the information reported in the newspaper article to be relevant to that end because he did not pursue it. See Freund v. Butterworth, 165 F.3d 839, 868 (11th Cir.) (en banc) (noting counsel's representation was not tainted by conflict, since conflict-free counsel would have chosen the same defense), cert. denied, --- U.S. ----, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999). Here, Keeling, who is free of conflict, followed the same course as that taken by Saunders.

3. Plea Negotiations

Another plausible alternative strategy would be a plea of guilty with a sentence other than death. And, that certainly would have been a reasonable alternative ***609** under the facts. However, the absence of plea negotiations was attributable to the decision of the Commonwealth's Attorney who advised that there was "[n]o way" he would allow a plea in the case. (1/13/99 Tr. T. at 158; 12/23/98 Dep. at 80-81.) There is nothing in the record to suggest that the plea negotiations were not pursued because Saunders previously had represented Hall. Of course, it is possible that evidence of a consensual encounter or adverse information about Hall might have prompted a willingness to negotiate, but, as explained above, the record discloses that strategies based on those concepts were neither plausible nor viable.

4. Failure to Apprise the Sentencing Court of Hall's Pending Charges and Hall's Strained Relationship With His Mother

After the second jury had fixed Mickens' sentence at death, but before the formal imposition of the sentence of death, a post-sentence report was prepared for the judge who ultimately sentenced Mickens to death. See Va.Code Ann 19.264.5 (Michie 1990). That report contained the following information:

> The victim's mother stated as a result of this offense, her marriage broke up. She stated also the offense shattered her world. She stated "all I lived for was that boy." As a result of the offense, the victim's mother stated she dropped out of school, she lost the potential of a good income, that her daughter became depressed for six months, and her husband went into the hospital for six months one month after Timothy died. She (mother) was left to deal with both her daughter's depression and her husband's illness.
>
> The victim's mother stated "I'll never be over the way my son was killed."

(Circuit Court for the City of Newport News, Clerk's Record, Post-sentence Report prepared 3/6/96.)

Mickens argues that Saunders could have used information gleaned from his representation of Hall to rebut the mother's statements that she was overwrought at the death of her son, but that his previous representation of Hall kept that attack on Hall's mother out of the sentencing proceeding. Mickens has not established that, in the context of the sentencing hearing required by Va.Code Ann. § 19.2-264.5 hearing, a tactic of that sort "possessed sufficient substance to be a viable alternative." Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir.) (en banc), cert. denied, --- U.S. ----, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999).

Under Va.Code Ann. § 19.2-264.5, when a jury has fixed a defendant's punishment at death, the trial court, before imposing sentence, must require a thorough investigation by a probation officer into the defendant's history and background so that the court "may be fully advised as to whether the sentence of death is appropriate and just." After considering the report, the court, "upon good cause shown," may set aside the death sentence and impose a sentence of life imprisonment. Id. The Supreme Court of Virginia has emphasized that, in recommending death, "the jury's verdict is not merely a recommendation to be followed or rejected by the trial court at its discretion." Frye v. Commonwealth 231 Va. 370, 345 S.E.2d 267, 286 (1986). Although the Supreme Court of Virginia has not posited a concise definition of what constitutes "good cause" in the capital sentencing context, the Court's consistent refusal to find good cause attests to the exacting nature of the standard. See Hedrick v. Commonwealth, 257 Va. 328, 513 S.E.2d 634, 641 (1999); Roach v. Commonwealth, 251 Va. 324, 468 S.E.2d 98, 113 (1996); Chandler v. Commonwealth, 249 Va. 270, 455 S.E.2d 219, 226-27 (1995); Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422, 438 (1985); Bunch v. Commonwealth, 225 Va. 423, 304 S.E.2d 271, 285 (1983).

Considering the difficulty of showing good cause under Virginia law and considering ***610** that Mickens has failed to show how impeaching Hall's mother's assertions of grief would have furthered a finding of good cause, it cannot be said that the tactic, if employed, would have met the test of viability. And, in any event, the tactic was inconsistent with Mickens' expressions of regret for the pain that Hall's death caused his mother. (3/29/96 Hr. T. at 22).

Thus, Mickens has failed to show that the purported conflict resulted in Saunders foregoing a plausible alternate strategy or tactic that was reasonable under the facts. And, perhaps more importantly, even if it is assumed that there was a plausible, viable alternate strategy that Saunders failed to pursue, the record shows no link between the failure to pursue it and the asserted conflict.

F. Adverse Effect: General

Wholly apart from the question of alternate strategies foresworn, Mickens raises two other reasons why the conflict adversely affected Saunders' representation. First, Mickens contends that Saunders' investigation was deficient. Second, Mickens argues that the failure of Saunders to pass along information to his co-counsel, Warren Keeling, was per se an adverse effect. Those contentions will be considered next.

1. Deficient Investigation

Mickens asserts that, but for the conflict, Saunders would have reviewed Hall's

juvenile file and would have pursued leads provided to the police by Bernard Gordon, Alicia Thrash, and Charity Fleming. According to Mickens, had these basic tasks been performed, Saunders would have uncovered evidence useful for his defense.

Saunders testified that he never considered reviewing Hall's juvenile file because he believed that file did not contain any information pertinent to Mickens' case. That, of course, misses the point because a reasonable investigation would have included an examination of Hall's past, including his JDR Court file (assuming that could had been accomplished under state law). Moreover, without reviewing the file, Saunders' view on that topic is speculative. But, the Court's review of Hall's juvenile file confirms that, on that score, Saunders' guess was a correct one.

The explanation given by Saunders for not pursuing the information contained in the police files because to do so would have been a waste of time is not so readily dispatched. Saunders says that he reviewed the police files and took notes of their contents. Those notes reflect that Bernard Gordon (the father of the family with whom Hall lived at the time of his death) told the police that "nothing much else of use--except that Tim [Hall] had been ducking three guys [he] owed money to for about three months. They came to the apartment at least once." (Pet.'s Ex. 2B at 1/13/99 Hr. T. at 127.) Those notes, of course, present the prospect that Hall's creditors might have killed him. Saunders testified that he intended to talk to Gordon, but that Gordon died before Saunders was able to interview him. (1/13/99 Hr. T. at 128.) Although Gordon might have provided information suggestive of another perpetrator, the failure to secure his knowledge before he died was not attributable to a conflict. That, however, does not explain why Saunders did not pursue the same lead from other sources. The lead should have been pursued because, given Mickens' position that he did not know Hall, the lead suggested that there might have been evidence of an alternate perpetrator. The record discloses no reason for the failure to follow that lead other than Saunders' lack of perspicacity or perhaps indolence. Neither of those reasons bespeaks that he failed to act because of his previous representation of Hall.

Next, Mickens faults Saunders for failing to pursue information which Alicia Thrash and Charity Fleming provided to the police which, according to Mickens, suggested that Hall was being harassed by ***611** a male prostitute on the night of the murder. (P.'s Resp. to Feb. 2, 1999 Order at 29.) Evidence of that sort also might have allowed counsel to argue the existence of another perpetrator. Alicia Thrash was Hall's friend and Hall intended to attend Thrash's sixteenth birthday party on the night that he was murdered (Saturday, March 28, 1992). After Hall was murdered, Thrash spoke to "Stephanie," Hall's ex-girlfriend. Stephanie told Thrash that she had talked to Hall on the night of his death. Saunders' notes reflect that on April 10, 1992, Thrash provided the following statement to the police:

> Everything got real messed up cause when we went to the wake [for Hall], this girl named Stephanie said Timmy [Hall] had called her Saturday night, all scared and nervous, talking about this prostitute was harassing him, saying all kinds of stuff, that he was harassing him over something or other, & then she told him to come pick her up, and he said that he was at the end of 29th Street, that is where he said by the construction office, that's where he was at. & she said he called her & told her to come pick him up like that.

(Pet.'s Ex. 2A at 1/13/99 Hr. Tr. at 124-25.) That information, of course, presented the possibility that Hall was killed in a dispute with a male prostitute.

On the other hand, Saunders also had access to Charity Fleming's statement to the police which indicated that Thrash's secondhand account of the events was less than reliable. According to Saunders' notes, Fleming "supposedly talked to Tim [Hall] on Sunday around 6-7 and wanted her or Stephanie (Ex-girlfriend) to pick him up at 29th St either on [the] corner or at Basic [Construction] because of problems he was having with a girl he picked up on Washington Ave. [a] couple of days before. (this could be just Bull/ or she could have the day wrong)." (Pet.'s Ex. 2B 1/13/99 Hr. T. at 127-28) (emphasis added). Fleming's account of the conversation indicates that Hall's request for a ride came on Sunday (the day after Hall's death) and was prompted by trouble that Hall was having with a girl, not a male prostitute.

Both Thrash and Fleming offered leads which may have made it more difficult for the Commonwealth to prove that Mickens was the murderer because they pointed to an alternate killer. However, Saunders' rejected the Thrash/Fleming lead because he did not believe that the lead was credible (12/23/98 Dep. at 52-54) for the reason that Fleming said that she spoke to Hall on Sunday, the day after Hall was killed. At the same time, Saunders concluded that the Thrash/Fleming lead pointed to an angry female as the perpetrator (1/13/99 Hr. T. at 131-32), and, therefore, concluded, in light of the overtly homosexual nature of the crime, that none of the leads suggested by Gordon, Thrash or Fleming could identify a viable alternative perpetrator of the crime. [FN19] Id. Those reasons for refusing to pursue evidence which pointed to the existence of an alternative perpetrator are not defensible, especially where, as here, a client's life is on the line. Additionally, Fleming's assertion that Hall was still alive on Sunday was hardly inconsequential to Mickens' defense considering that the Commonwealth's Attorney conceded, at Mickens' preliminary hearing, that it was not "going to be able to determine the precise date that this homicide took place." (P.'s Ex. 5 from Federal Evidentiary Hearing, at 59.). Evidence of that sort could have helped to undermine the relevance of the testimony of Vincent West and Bruce Mitchell that Mickens was lurking around the area where Hall was murdered on Saturday night.

> FN19. Saunders spoke to Thrash over the telephone, but did not question her regarding her statement about a prostitute harassing Hall. (1/13/99 Hr. T. at 242-43.)

However, Mickens must do more than show that Saunders could, or should, have pursued a promising lead. He must also establish some link between the asserted actual conflict and the decision to forego ***612** further investigation of the lead. See Freund v. Butterworth, 165 F.3d 839, 860, 869 (11th Cir.) (en banc), cert. denied, --- U.S. ----, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999); Wilson v. Moore, 178 F.3d 266, 281 (4th Cir.1999); Stoia v. United States, 109 F.3d 392, 397 (1997) (rejecting conflict claim where petitioner "failed to show the connection between any actual conflict of interest and any adverse effect on" petitioner's defense). In other words, Mickens has "the burden of proving through a preponderance of the evidence" that Saunders "would have" pursued the Thrash and Fleming leads "but for" Saunders' professional relationship with Hall. Freund, 165 F.3d at 869. Mickens may carry this burden by showing that pursuit of these leads "was inherently in conflict with" Saunders' "other loyalties or interests" or by other probative evidence that he did not pursue the leads because of those interests. Id. at 860. This, he has failed to do.

In sum, there is an absence of convincing

evidence connecting the Thrash and Fleming leads with Saunders representation of Hall. There is no suggestion that Thrash, Fleming or Stephanie, Hall's ex-girlfriend, were involved, even tangentially, in the concealed weapons and assault charges as to which Saunders served as counsel to Hall. Nor has Mickens produced any plausible evidence that, during his representation of Hall, Saunders suspected that Hall was involved in prostitution.

When all is said, the Court credits Saunders' testimony that he did not refrain from taking any actions for Mickens because of his earlier representation of Hall. (1/13/99 Hr. T. at 219, 240-41); Freund, 165 F.3d at 869. And, Mickens has failed to show that pursuit of the Thrash and Fleming leads was inherently in conflict with, or was not undertaken because of, Saunders' loyalty to Hall or because of Saunders' own interests.

2. Saunders' Failure to Advise Keeling of Information About Hall

While it certainly is reasonable (and expected) that counsel would share with co-counsel that he previously had represented the victim, it is undisputed that Saunders never told Keeling about his previous representation of Hall. [FN20] Mickens asserts that Saunders failed to share the fact of his representation of Hall and whatever information that he had about Hall because Saunders feared that his conflict would be discovered and that he would be removed as Mickens' counsel in the capital case, thereby forfeiting the prestige and financial benefits which are associated with serving as counsel in this case.

> FN20. According to Saunders, he assumed that Keeling (and everyone else) knew that he had represented Hall. (1/13/99 Hr. T. at 105.) That assertion lacks evidentiary support and, considering the secrecy attached to juvenile proceedings and a lawyer's obligations of confidentiality, the explanation borders on the absurd. Indeed, Saunders could not recall mentioning to anyone, at the time he represented Mickens, that he had previously represented Hall. Id. at 107.

Virginia's scheme for compensating lawyers in capital cases, parsimonious as it is, does not support a finding that Saunders was motivated by financial gain. And, although some publicity, and hence some prospect of luring clients, often attends representation of a client in a notorious case, the record does not disclose that Mickens' case was of that ilk, notwithstanding that, like most murders, substantial publicity surrounded it.

After viewing Saunders' testimony, the Court is unconvinced that such selfish "loyalties or interests" existed, much less motivated Saunders' silence. (1/13/99 Hr. T. at 93, 102-4). Rather, this lapse of communication is attributable to Saunders' myopic view of the potential conflicts and utter insensitivity to the ethical issues raised by the facts. (Id. at 95, 108- 11, 220, 227-28.) Saunders did not believe the Hall representation was a source of relevant information or potential conflicts for the Mickens case. Thus, as far as he was ***613** concerned, his perception ended the matter for all concerned: his client, the court and co-counsel. The record does not demonstrate that Saunders' silence, albeit inexcusable, was attributable to Saunders' self-interest. See Williams v. French, 146 F.3d 203, 212-13 (4th Cir.1998), cert. denied, 525 U.S. 1155, 119 S.Ct. 1061, 143 L.Ed.2d 66 (1999).

VII. FAILURE OF THE COURT TO CONDUCT AN INQUIRY INTO THE PURPORTED CONFLICT

As a separate, but related ground of relief, Mickens contends, relying on Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), that he is entitled to a new trial because JDR Court Judge Foster removed Hall's criminal case from the docket, and shortly thereafter, without conducting any inquiry, appointed Saunders to represent Mickens on the charges arising out of Hall's murder. In Wood, the Supreme Court sua sponte raised an attorney conflict of interest claim. The Court concluded that "the possibility of conflict was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." Id. at 272, 101 S.Ct. 1097 (emphasis added). However, the Court could not be sure whether counsel was adversely affected by a conflict. Consequently, the Court remanded the case for a hearing to determine whether an actual conflict existed and, if so, whether the right to independent counsel had been waived. Id. at 273-74, 101 S.Ct. 1097.

Mickens cites a footnote in Wood for the proposition that the absence of any inquiry by Judge Foster requires the reversal of his conviction. That footnote reads:

> Justice White's dissent states that we have gone beyond the recent decision in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, Sullivan mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' Id. at 347, 100 S.Ct. 1708

Wood, 450 U.S. at 272 n. 18, 101 S.Ct. 1097 (emphasis in original).

[36][37] The Commonwealth responds that the JDR Court did not try Mickens and thus is not the "trial court" charged with a duty to inquire under Wood. That argument, however, is not grounded on authority which supports the proposition that only the court that actually tries the defendant is charged with making such an inquiry. Rather, precedent and common sense dictate that the duty to inquire into apparent conflicts arises before the case winds its way to the particular court and judge tasked with conducting the defendant's trial. See Holloway v. Arkansas, 435 U.S. 475, 489-90, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (emphasizing the importance of conflict free counsel in pretrial proceedings, including plea negotiations); Wilson v. Morris, 527 F.Supp. 422 (C.D.Ill.1981) (concluding that the preliminary examination judge is charged with making inquiry when apprised of particular conflict) rev'd on other grounds, 724 F.2d 591 (7th Cir.1984) (en banc) (however that court's duty to perceive the conflict is qualified by its limited role); Cf. Carter v. Commonwealth, 11 Va.App. 569, 400 S.E.2d 540, 543 (1991) (reversing conviction for court's failure to initiate Wood inquiry when probable risk of conflict was brought to its attention during pre-trial proceedings). Thus, the duty to inquire into particular conflicts extends to the JDR Court in this instance because it appointed Mickens' counsel.

Moreover, the record before Judge Foster presented special circumstances of an apparent possible conflict which required judicial inquiry. On Friday, April 3, 1992, Judge Foster removed the assault and concealed weapons charges against Hall from the docket, noting that the defendant was deceased. (Commonwealth v. Hall, No. J.40845-2, 3, (Newport News JDR ***614** Court Apr. 3, 1992.)) Judge Foster's handwritten order dismissing the charges was entered directly upon the individual docket for Hall's juvenile charges. That docket entry consisted of a single page which set forth Hall's full name, date of birth, an abbreviated history of the proceedings, the

charges, and the identity of his appointed attorney, Bryan Saunders. Id. Judge Foster entered the order removing Hall's case from the docket before the case was called. (1/13/99 Hr. T. at 96-97.) And, Saunders testified that he learned from some unidentified person (either in the courthouse or in the courtroom) that the charges against Hall had been dismissed because Hall was dead. Id. at 96-97, 218. There was no evidence that Saunders appeared before Judge Foster on the date that the charges against Hall were dismissed, Friday, April 3, 1992.

[38] However, on Monday, April 6, 1992, the next business day, Judge Foster appointed Saunders to represent Mickens in the capital murder of Hall. (Newport News Circuit Court Record at 5.) Mickens' arrest warrants, which appear to have been before Judge Foster when she appointed Saunders, charged that "on or about March 30, 1992" Mickens murdered "Timothy Jason Hall, white male, age 17, by stabbing, and during the commission of an abduction, and sodomy as well as robbery". Id. at 4. At that time, Judge Foster knew, or should have know, that Saunders was being appointed to represent Mickens on charges of murdering the juvenile Saunders recently represented.

Certainly, on Monday, April 6, 1992, Judge Foster connected, or had the capacity to connect, the juvenile, capital murder victim, Timothy Jason Hall with the deceased juvenile defendant whose case she had removed from her docket the previous Friday. The heinous nature of the crime and the publicity it received make it difficult to accept that the connection would have escaped Judge Foster's notice. (1/13/99 Hr. T. at 36.) In selecting counsel for Mickens, the judge was no doubt aware that Mickens faced charges as to which it might be necessary to counter "evidence about the victim and about the impact of the murder on the victim's family", at least at the penalty phase of the case. See Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). In light of that prospect, Judge Foster should have recognized the potential conflict in appointing the attorney who represented the victim on criminal charges at the time of his death, to represent the capital defendant at sentencing. The failure to do so was error under Wood. [FN21]

> FN21. Then, on July 17, 1992, Judge Foster conducted the preliminary hearing on the charges against Mickens. (Newport News Circuit Court Clerk's Record at 2 and 4.) At that hearing, the Commonwealth presented twelve witnesses and more than one hundred pages of testimony in support of its case. (P.'s Ex. 5 from 1/13/99 Hr.) That evidence afforded Judge Foster with an overview of the known circumstances surrounding Hall's death. At the conclusion of the Commonwealth's evidence, Judge Foster found probable cause to certify a charge of attempted forcible sodomy and capital murder during the commission of attempted forcible sodomy to the grand jury. Id. at 130. Judge Foster found no probable cause on the charges of abduction with intent to defile and robbery.

However, just as in Wood, the failure to inquire into a possible conflict does not require reversal. Wood v. Georgia, 450 U.S. 261, 273-74, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). Properly understood, the trial court's duty to inquire into known or obvious conflicts of interest "is a reflection of the fact that absent an inquiry, the record will demonstrate that a particular conflict existed in violation of the Sixth Amendment. Unless a judicial inquiry rebuts the

conclusion otherwise compelled by the circumstances, relief must be granted." Wilson v. Morris, 724 F.2d 591, 594 (7th Cir.1984) (en banc). Thus, where, as here, further judicial inquiry reveals that potential conflict never ripened into an actual conflict, the petitioner is entitled to no relief. See United States v. Young, 644 F.2d 1008, 1013 (4th Cir.1981) (remanding for an inquiry into whether an actual conflict***615** existed in successive representation), appeal after remand, 677 F.2d 381, 383 (4th Cir.1982). See also Garcia v. Bunnell, 33 F.3d 1193, 1199 (9th Cir.1994); Boysaw v. Deans, No. 89-7794, 935 F.2d 267, 1991 WL 89923, at *5 n. 1 (4th Cir. May 31, 1991); Sutton v. Murray, No. 88-7192, 881 F.2d 1070, 1989 WL 87660 at *1 (4th Cir. Aug.1, 1989); Wilson v. Morris, 724 F.2d 591, 594 (7th Cir.1984) (en banc); United States v. Winkle, 722 F.2d 605, 611- 612 (10th Cir.1983); Brien v. United States, 695 F.2d 10, 15 n. 10 (1st Cir.1982); United States v. Green, 680 F.2d 183, 191-92 n. 12 (D.C.Cir.1982); Cox v. Norris, 958 F.Supp. 411, 418 (E.D.Ark.1996); Bonin v. Vasquez, 807 F.Supp. 589, 606 (C.D.Cal.1992); In Re Richardson, 100 Wash.2d 669, 675 P.2d 209, 215 (1983). But see Ciak v. United States, 59 F.3d 296, 302 (2d Cir.1995) (applying automatic reversal rule).

Judge Foster was not relieved of her duty to inquire into the apparent possible conflict presented here simply because Mickens' trial was to be conducted in another court or because some of her chargeable knowledge stemmed from a separate criminal matter. However, the "mere possibility of a conflict is insufficient to impugn a criminal conviction." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). As explained elsewhere in the opinion, the possible conflict of interest presented by Saunders' successive representation of Hall and Mickens never ripened into an actual conflict nor was Saunders' advocacy impaired thereby. Thus, Mickens has not shown that the shortcomings of court and counsel alleged in Claims 5 and 6 "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (describing standard for establishing prejudice sufficient to excuse a procedural default). For the foregoing reasons, Claims 5 and 6 will be dismissed.

VIII. CONCLUSION

As Mickens so vigorously contends, Saunders conducted himself unwisely, and in derogation of his ethical duties, in successively representing Hall and his murderer without ever bringing such representation to the attention of the court or Mickens. And, the Newport News JDR Court was on notice of sufficient facts about the relationship between Hall and Saunders that it should not have appointed Saunders to represent Mickens without a full inquiry and without apprising Mickens of the potential conflict. However, that representation did not violate Mickens' constitutional rights.

Claims 1, 2 and 4 are dismissed on the merits. Claims 3 and 5 through 12 are procedurally defaulted. Mickens has not attempted to excuse his default of Claim 3, accordingly that Claim is dismissed. With respect to Claims 5 and 6, Mickens has demonstrated cause, but not prejudice, thus, Claims 5 and 6 will be dismissed. Finally, Mickens has failed to show cause, or a fundamental miscarriage of justice to excuse his default of his remaining claims, thus Claims 7 through 12 are dismissed. The petition for a writ of habeas corpus is denied. The action is dismissed.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of

record.

It is so ORDERED.

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. Claims 1, 2 and 4 are dismissed on the merits.
2. Claims 3 and 5 through 12 are procedurally defaulted and dismissed.
3. The petition for a writ of habeas corpus is denied.
4. The action is dismissed.

Mickens may appeal the decision of the Court. Should Mickens wish to do so, ***616** written notice of appeal must be filed with the Clerk of the Court within thirty (30) days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

It is so ORDERED.

END OF DOCUMENT

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 15th *day of* December, 1997.

Walter Mickens, Jr., No. 212431, Petitioner.

- against Record No. 971669

Warden of the Mecklenburg Correctional Center, et al., Respondents

Upon a Petition for a Writ of Habeas Corpus

Applying the rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations 3, 6, 7, 8, 10, 11, 12 and 14; the rule in Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations 1, 2, 4, 5, 9 and 13; and finding no merit in petitioner's allegations of ineffective assistance of counsel, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. It is therefore ordered that the said petition be dismissed.

A Copy,

Teste:

David B. Beach, Clerk

By: Patricia M. Harris
Deputy Clerk

Was [illegible] filed

OPPOSITION BRIEF

QUESTIONS PRESENTED

I. Should this Court grant a stay of execution and writ of certiorari to review the en banc Fourth Circuit decision denying federal habeas corpus relief on Mickens' claim that a state juvenile court judge should have known of, and inquired into, a possible conflict of interest because Mickens was represented by an attorney who previously represented Mickens' murder victim on minor juvenile charges, despite the fact that:

(1) the claim was defaulted and Mickens failed to demonstrate prejudice from the default;

(2) the district court conducted an evidentiary hearing and made unchallenged findings of fact that there was no "actual conflict of interest;"

(3) the en banc Fourth Circuit correctly held that petitioner must demonstrate an actual conflict of interest adversely affecting counsel's representation;

(4) petitioner failed to demonstrate that the state juvenile judge had sufficient notice of a "particular conflict," and does not contest the fact that the trial court had no knowledge suggesting a conflict; and

(5) the decision below is not in conflict with the decisions of those federal and state courts of appeal that follow Wood v. Georgia, 450 U.S. 261 (1981)?

II. Should this Court grant a stay of execution and certiorari to review the en banc Fourth Circuit's unremarkable requirement than an adverse effect has to be linked to the alleged conflict of interest, which rule is in accord with precedent from this Court and the various courts of appeals?

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STATEMENT OF THE CASE

A. Prior Proceedings

Mickens was convicted in a jury trial in the Newport News Circuit Court in 1993 of the capital murder of 17 year old Timothy Jason Hall in the commission of an attempted forcible sodomy, and was sentenced to death. The Virginia Supreme Court affirmed Mickens' convictions and death sentence, Mickens v. Commonwealth (Mickens I), 442 S.E.2d 678 (Va. 1994), but this Court remanded the case to the state court following the decision in Simmons v. South Carolina, 512 U.S. 154 (1994), see Mickens v. Virginia, 513 U.S. 922 (1994), and the Virginia Supreme Court ordered a new sentencing hearing. Mickens v. Commonwealth (Mickens II), 457 S.E.2d 9 (Va. 1995).

A second jury again sentenced Mickens to death in February 1996. The sentence was affirmed on direct appeal. Mickens v. Commonwealth (Mickens III), 478 S.E.2d 302 (Va. 1996), cert. denied, 520 U.S. 1269 (1997). After unsuccessfully pursuing state habeas corpus relief, Mickens filed his federal habeas petition in the district court in June 1998, for the first time raising a claim that one of his court-appointed trial counsel had a conflict of interest because he previously had represented the victim of Mickens' capital crime.

Notwithstanding Mickens' state court default, the district court appointed an investigator, ordered extensive discovery and held an evidentiary hearing in January 1999. On November 5, 1999, the district court ordered the petition dismissed, finding that the potential conflict of interest never ripened into an actual conflict and did not impair counsel's advocacy on behalf of Mickens. Mickens v. Greene, 74 F. Supp. 2d 586, 615 (E.D. Va. 1999).

Mickens appealed and, on September 14, 2000, a divided panel of the United States Court of Appeals for the Fourth Circuit reversed, directing the district court to grant the writ because, in contradiction of the district court's factual findings, the panel majority believed "Mickens' lead trial counsel had a conflict of interest that the judge appointing counsel failed to look into." Mickens v. Taylor, 227 F.3d 203, 218 (4th Cir. 2000). On October 20, 2000, the Fourth Circuit granted rehearing *en banc*. On February 16, 2001, the *en banc* Fourth Circuit affirmed the denial of federal habeas corpus relief in a 7-3 decision, concluding that Mickens had failed to demonstrate that the alleged conflict of interest adversely affected counsel's performance. Mickens v. Taylor, 240 F.3d 348 (4th Cir. 2001) (*en banc*). On March 13, 2001, the Fourth Circuit denied Mickens' petition for rehearing of the rehearing *en banc*.

On March 2, 2001, pursuant to Virginia Code § 53.1-232.1, the Newport News Circuit Court set Mickens' execution for April 17, 2001. Mickens' motion for a stay of execution was denied by the Fourth Circuit on March 26, 2001. Mickens v. Taylor, ___ F.3d ___ (4th Cir. 2001) (*en banc*).

B. The Facts of the Crimes

The Virginia Supreme Court found the facts of Mickens' crimes as follows:

> On March 28, 1992, Timothy Jason Hall, age 17, resided with 14-year-old Raheem Gordon and Gordon's father in an apartment located at 28th and Washington Streets in the City of Newport News. Hall and Gordon were roommates, and they often exchanged clothes, including shoes.
>
> That day, between 7:00 and 8:00 p.m., Hall gave Gordon a ride, in Hall's automobile, to a party at the nearby Towers apartment building. At the time, Hall was wearing a pair of Gordon's Nike brand "Cross Trainer" tennis shoes. He also was wearing blue jeans and a shirt imprinted with either the word, "Duke," or the words, "Miami Hurricanes." Hall had intended to return to the party, but he never did. Neither Gordon nor his father ever saw Hall after that evening.
>
> Vincent West and Bruce Mitchell also attended the party. About 8:00 p.m., they left the party and went to a nearby convenience store. After purchasing a few items and leaving the store, they sat in a park adjacent to the Towers apartment building. While sitting there, West and Mitchell saw a man with a bicycle, hiding in some bushes and looking at them. The man later was identified as the defendant, Mickens.

The following day, Gordon saw Hall's automobile. It was parked on West Avenue, near 28th Street, close to the Towers apartment building and in the same place it had been parked the previous night.

On March 30, 1992, about 12:30 p.m., Chris Basford was walking along the James River between 25th and 30th Streets when he saw a body beneath an abandoned construction company building. The body of a male Caucasian was lying face down on a mattress under a sheet of plywood. The body was nude from the waist down, except for white athletic socks, and its legs were spread apart approximately 12 inches. The victim was identified as Timothy Jason Hall.

Pubic hairs were recovered from the victim's buttocks. Bloody "transfer" stains were evident on the outsides of the victim's thighs, and a white liquid substance was observed close to the victim's anus. Cigarette butts lying near the mattress also were recovered, and the mattress cover was seized for scientific examination. Nearby, the police found a pair of men's blue jeans and white underwear shorts that had washed up in the surf of the river. Gordon identified the clothes as those worn by Hall on the evening of March 28, 1992.

An autopsy revealed 143 separate "sharp force injuries" to the victim's body. Of the injuries, 62 were paired stab injuries that could have been caused by a multiple-blade knife, 13 were single stab wounds, and three were paired incised wounds.

The medical examiner who performed the autopsy concluded that the victim had bled to death and that 25 of the 143 wounds were fatal. The fatal wounds included four pairs of stab wounds that punctured the right lung, three single stab wounds that punctured the left lung, seven stab wounds to the skull that penetrated the brain, a stab wound to the forehead that also penetrated the brain, one pair of stab wounds that perforated the liver, and a pair of stab wounds to the right neck that severed the carotid artery and the jugular vein.

The medical examiner opined that the fatal wounds may not have caused instant death. Instead, she estimated that the victim could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, the victim may have been conscious.

On the evening of April 4, 1992, the police were informed that a black male, wearing a blue and white jacket and riding a bicycle, had assaulted a juvenile. Responding to this information, Police Officer D. A. Seals and Detective Dallas Mitchell found Mickens riding a bicycle in the parking area of the abandoned construction company building.

Seals exited the police car, displayed his badge, and approached Mickens. Mickens, thereupon, fled on his bicycle. Shortly thereafter, Seals and Mitchell again came

upon Mickens as he was being detained by other police officers. Mickens was arrested at 7:00 p.m. on the charges involving the juvenile.

Mickens agreed to talk with the police after being advised of his Miranda rights. Officer Mitchell told Mickens that he knew Mickens had killed Hall, but the officer did not tell Mickens how Hall had been murdered. In denying involvement in Hall's murder, Mickens said, "You didn't find any knife on me; did you?"

The following morning, warrants were obtained charging Mickens with Hall's murder and attempted sodomy. When Officer Seals handed Mickens copies of the warrants, Mickens said, "I accept the warrants, I accept the charges." Seals asked Mickens what was meant by that statement, and Mickens responded, "Mother f____r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael Jacobs wearing the Nike brand "Cross Trainer" tennis shoes that Hall had been wearing when Gordon had last seen Hall alive. Jacobs told the police that he had bought the shoes from Mickens for $5.00 the previous week.

An examination of the pubic hairs removed from Hall's buttocks revealed that they were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens. The expert who examined the hairs further testified that the hairs could not have originated from Hall because he was a Caucasian. The witness also stated that tissue was attached at the roots of the hairs, indicating the hairs had been forcibly removed, possibly by the rubbing of the genitals against Hall's buttocks.

An examination of a stain found on the mattress cover revealed human sperm. Through DNA analysis (RFLP type) of the sperm and of blood samples taken from Hall and Mickens, the expert determined that Hall could not have produced the stain. The expert determined further that Mickens' DNA pattern matched the DNA pattern in the stain on the mattress cover. The witness also stated that the approximate percentages of the population that could have deposited the stain was one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics.

The cigarette butts and certain other hairs recovered at the crime scene also were subjected to DNA analysis (PCR type). Both Hall and Mickens had D.Q. Alpha type 1.2, 4. The expert making the comparisons determined that Mickens could not be eliminated as the source of the hairs and of the saliva on the cigarette butts. Mickens smoked cigarettes, and Hall was never known to smoke cigarettes.

Tyrone Brister testified that, when he and Mickens shared a holding cell at the courthouse on March 26, 1993, he asked Mickens why he was in the cell. Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister

that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

Mickens v. Commonwealth (Mickens I), 442 S.E.2d at 681-683 (footnotes omitted).

C. The Facts of the Resentencing

In the 1996 resentencing, the Commonwealth again presented the evidence of Mickens' prior convictions. He was convicted of attempted larceny from the person in 1973; sodomy, robbery and grand larceny from the person in 1973; and sodomy and robbery in 1980. Mickens v. Commonwealth (Mickens III), 478 S.E.2d at 304.

> The evidence also established that Mickens had been paroled from prison three times. His initial parole on October 30, 1973, was revoked on August 16, 1974, because he had been convicted of robbery, grand larceny from the person, and sodomy. Mickens' second parole on July 1, 1979, was revoked on April 11, 1980, because he had been convicted of sodomy and robbery. His third parole commenced on December 19, 1991, and he was on parole when Hall was murdered.
>
> Charles Edward Siron, one of Mickens' sodomy victims, testified that, on February 14, 1974, when he was 18 years old, he and Mickens were incarcerated in the Newport News City Jail. While Siron was sleeping, Mickens put a razor blade to Siron's throat and forced him out of bed and into the shower area where Mickens attempted to sodomize him.
>
> Ruby Bunn, one of Mickens' robbery victims, testified that, on February 7, 1974, she was teaching her second grade class at Erwin School in the City of Newport News. Mickens appeared at the class-room door holding a knife and demanding her pocketbook. Bunn went to get her money from her purse, and, when she looked up, she saw Mickens standing near a small boy and holding the knife a few inches from the boy's head. Bunn gave Mickens her money, and he left the classroom.

Mickens v. Commonwealth, 478 S.E.2d at 304-305.

D. The Facts of Counsel's Prior Representation of Hall

The district court found the following facts concerning the prior representation. Mickens v. Greene, 74 F. Supp. 2d at 599-600, 614. On February 21, 1992, Timothy Hall's mother swore out a complaint against her son for assault and battery. She alleged that on February 16, Hall

grabbed her and shoved her to the ground. On March 13, 1992, Hall was charged with possession of a concealed weapon (a serrated bread knife wrapped in newspaper). The juvenile court's records indicate that both the assault and battery and concealed weapon charges were presented in a detention hearing on March 20, 1992. Substitute Juvenile Court Judge Criver appointed Brian Saunders to represent Hall and continued the hearing to April 3, 1992.

Between March 20 and March 28, Hall met one time with Saunders at the attorney's office for 15-30 minutes. Hall was last seen alive on March 28, 1992, a Saturday, and his body was found on Monday, March 30, 1992. The juvenile court's records show that on Friday, April 3, 1992, before any hearing was conducted, a different Juvenile Court judge, Foster, noted on the docket sheet, "removed from docket" and "Def. Deceased." On the same day, Saunders appeared at the juvenile court for the scheduled hearing on Hall's charges and was told by someone that Hall was dead and the charges had been dismissed. This information was not a matter Saunders learned in court and most likely came from a court clerk.

Mickens was arrested on Saturday April 4, 1992, and on Monday April 6, 1992, Judge Foster appointed Saunders and Warren Keeling to represent Mickens. Keeling had no knowledge of Saunders' prior representation of Hall at the time of Mickens' trial, sentencing and resentencing.

E. The District Court's Findings of No Actual Conflict or Adverse Effect.

The district court conducted a full evidentiary hearing and found the following facts supporting its determination that Mickens had failed to demonstrate an actual conflict of interest:

"Saunders' representation of Hall was very limited in scope and duration." Mickens v. Greene, 74 F. Supp. 2d at 604. The representation of Hall did not involve the same subject matter as the charges facing Mickens and did not involve the same criminal transactions or

events. Id. Mickens failed to show that Hall was a prostitute, or that he had consented to sexual relations with Mickens. Id. "Mickens has failed to demonstrate a correlation, much less a substantial and particular relationship, between Saunders' representation of Hall for assault and possession of a concealed weapon and his representation of Mickens on attempted forcible sodomy and capital murder charges." Id. at 605.

The district court strongly stated its disapproval of Saunders' failure to appreciate the ethical issues posed in these circumstances but, after hearing the testimony and considering petitioner's evidence, found that Mickens failed to establish that Saunders possessed a personal interest in concealing the alleged ethical conflict in representing Mickens. "[T]he evidence shows that, regrettably, Saunders never struggled with the ethical issues envisioned by Mickens." Mickens v. Greene, 74 F. Supp. 2d at 605. "[T]he Court is unconvinced that ... selfish 'loyalties or interests' existed, much less motivated Saunders' silence" about the prior representation of Hall. Id. at 612.

Saunders considered his representation of Hall ended when the juvenile charges were dismissed. Mickens v. Greene, 74 F. Supp. 2d at 605. Saunders did not perceive any "actual conflict," did not think he had received any confidential communications from Hall, and saw no connection between the two cases. Id. at 606. "[T]he Court concludes that, as a factual matter, Saunders did not believe that any "continuing duties to a former client might interfere with his consideration of all facts and options for his current client." Id.(internal punctuation omitted).

"[T]he record here confirms that Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing." Mickens v. Greene, 74 F. Supp.2d at 606. Hall's record of juvenile charges was not relevant to Mickens' defense because Mickens' testimony foreclosed any theory of self-defense. Id. at 606, n.15.

The District Court also carefully considered and rejected Mickens' allegations of an "adverse effect":

A "consent defense" was an "implausible alternative theory" foreclosed by the evidence, including choke marks found on the victim's neck, blood stains on Hall's thighs, 143 stab wounds, and Mickens' own insistence to his attorneys and in his testimony that *he did not know Hall and had no involvement in these crimes*. Mickens v. Greene, 74 F. Supp. 2d at 607. "Saunders discarded consent as a strategy not because of any loyalty to Hall, but because neither the facts nor Mickens' testimony was compatible with such a strategy." Id. The Fourth Circuit specifically upheld these findings. Mickens, 240 F.3d at 361-362.

Using "negative information" about Hall at sentencing, based on the premise that it would mitigate the severity of a capital murder, was inconsistent with Mickens' own statements of innocence and sympathy and would have appeared disingenuous. Mickens v. Greene, 74 F. Supp. 2d at 608. After "diligent investigation by federal habeas counsel," Mickens failed to uncover any evidence to show that Hall was a male prostitute. Id. Such evidence would have been useful only in connection with the unavailable consent defense, and "the propensity of that approach to backfire made it an unreasonable alternate strategy or tactic at sentencing." Id. Even if such "negative information" existed and could be considered as offering a plausible strategy, it was Mickens' second lawyer, Keeling, and not Saunders, who was in charge of preparing for sentencing. Keeling was aware of Hall's juvenile charges and other circumstances of his life from a newspaper report, and he did not consider any of that information relevant. Id. The Fourth Circuit specifically upheld these findings. Mickens, 240 F.3d at 361-362.

Saunders did not engage in extensive plea negotiations because the Commonwealth's Attorney had rejected any plea agreement for a sentence less than death. Mickens v. Greene, 74

F. Supp. 2d at 608-609. Using information about Hall's juvenile charge of assaulting his mother to "rebut" her 1996 victim impact statement containing assertions of grief would have been inconsistent with Mickens' statements of sympathy and not a viable tactic in the context of Virginia's sentencing process. Id. at 609-610. The Fourth Circuit specifically upheld these findings. Mickens, 240 F.3d at 361-362.

Mickens' allegations that Saunders conducted a deficient investigation into leads about other possible suspects had no connection to the alleged actual conflict. "Mickens may carry this burden by showing that pursuit of these leads was inherently in conflict with Saunders' other loyalties or interests or by other probative evidence that he did not pursue the leads because of those interests. This he has failed to do." Mickens v. Greene, 74 F. Supp. 2d at 612 (citation and internal punctuation omitted). The Fourth Circuit also specifically upheld these findings. Mickens, 240 F.3d at 361-362.

REASONS WHY THE WRIT AND APPLICATION FOR A STAY OF EXECUTION SHOULD BE DENIED

Mickens asks this Court to stay his execution and grant certiorari in this collateral case to review his defaulted claim that a state judge failed to conduct an inquiry into a possible conflict of interest which he asserts was required by this Court's decision in Wood v. Georgia, 450 U.S. 261 (1981). Mickens presents his claim of conflict as if it were being raised on direct appeal and as if the fact of an attorney's prior representation of a defendant's victim alone constitutes a *per se* conflict.[1] This Court, however, never has suggested that any particular combination of

[1] Claims of a Sixth Amendment violation have been rejected in circumstances where the alleged conflict involved an attorney's prior representation of a defendant's victim. See Crisp v. Duckworth, 743 F.2d 580, 588 (7th Cir. 1984) (finding no conflict when defense counsel previously represented murder victim in unrelated criminal action); Kirkpatrick v. Butler, 870 F.2d 276, 284 (5th Cir. 1989) (finding no conflict where defense counsel had friendship with,

representations makes out a conflict of interest as a matter of law. See Burger v. Kemp, 483 U.S. 776, 783 (1987) (law partners representing codefendants treated as "one attorney," and "it is settled that...'joint representation[ ] is not per se violative of constitutional guarantees of effective assistance of counsel'"), quoting Holloway v. Arkansas, 435 U.S. 475, 482 (1978). "We have never held that the possibility of prejudice that 'inheres in almost every instance of multiple representation' justifies the adoption of an inflexible rule that would presume prejudice in all such cases." Burger, 483 U.S. at 783, quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Instead, to demonstrate a Sixth Amendment violation involving a conflict of interest, a petitioner must establish that his attorney was burdened with "an actual conflict of interest" that "adversely affected" the lawyer's performance. Sullivan, 446 U.S. at 349. "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. at 350.

Mickens argues that the Fourth Circuit's decision denying federal habeas corpus relief on his defaulted claim erroneously held him to the burden of demonstrating that an "actual conflict of interest adversely affected" his attorney's representation, and allegedly conflicts with Wood and other direct appeal decisions of several federal and state courts of appeals. He also asserts the existence of a split among the circuits on subsidiary issues of whether a petitioner must demonstrate some "link" between an alleged conflict and "adverse effect" and how that linkage is demonstrated.

and had in the past represented, members of murder victim's family); Mosely v. Scully, 908 F. Supp. 1120 (E.D. N.Y. 1995) (finding no actual conflict where counsel previously represented murder victim on unrelated charges); Dixon v. Quarles, 627 F. Supp. 50 (E.D. Mich.) (finding no actual conflict even though defense counsel previously represented the murder victim), aff'd, 781 F.2d 534, 535 (6th Cir. 1985).

Mickens' petition does not present "compelling reasons" warranting this Court's review. U.S. Sup. Ct. Rule 10. His Wood v. Georgia claim fails for a variety of reasons independent of Mickens' arguments in this Court. First, and most obviously, this is a defaulted claim, never raised in the state courts, and, as the Fourth Circuit found, Mickens has failed to demonstrate prejudice from his default.

Second, the claim fails as a matter of law because Mickens has failed to prove an "actual conflict" as a matter of fact. The district court conducted a full evidentiary hearing, made unambiguous findings of fact supported by the evidence and the court's credibility findings, and determined that any potential for conflict never "ripened" into an "actual conflict." These findings of fact, which Mickens does not even challenge as "clearly erroneous," independently defeat Mickens' claim that he can show a Sixth Amendment violation on the basis of an "actual conflict" without being required to show that the conflict "adversely affected" counsel's representation. Mickens' claim that the state court should have initiated an inquiry falters on the fact that the trial judge undeniably had no knowledge of even a possible conflict and Mickens failed to demonstrate that a state juvenile court judge knew or should have known of any particular conflict whatsoever.

Third, the supposed disagreement that Mickens asserts exists between the Fourth Circuit's decision and this Court's precedents is no conflict at all, because the Fourth Circuit correctly interpreted this Court's conflict of interest decisions. Moreover, the several variations among the circuits and state courts in the description of Wood v. Georgia claims does not present any real conflict in the application of federal law which requires this Court's attention in this case. Mickens' hypertechnical argument that the Fourth Circuit's analysis of "adverse effect"

somehow conflicts with the decisions of other circuits is based on Mickens' misreading of the decision in his case and the application of law in other cases.

Finally, this Court must see Mickens' argument for what it is: a plea to ***extend*** the law governing conflict of interest claims beyond what the lower courts quite reasonably have found to be clearly established. This type of extension, or even "fleshing out" of rules, simply is not permitted on collateral review and thus requires denial of certiorari review in this case.

I. MICKENS HAS NOT DEMONSTRATED COMPELLING REASONS FOR THIS COURT TO REVIEW HIS DEFAULTED AND MERITLESS WOOD v. GEORGIA CLAIMS.

A. The Court Should Not Grant Certiorari to Review a Defaulted Claim For Which Mickens Has Not Demonstrated Prejudice.

In arguing that he presents issues decided "squarely on the merits," Mickens strategically ignores the fact that his conflict of interest claims are defaulted, that every judge who has reviewed his claims has acknowledged the procedural default, and that the merits of his claims have been addressed ***only*** in the context of determining whether Mickens could establish "prejudice" for purposes of avoiding his default.[2] See Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977) (stating "cause and prejudice" test for federal habeas review of defaulted claims); Gray v. Netherland, 518 U.S. 152, 161-162 (1996) (claims never presented in state habeas action are

[2] The *en banc* majority rejected the Respondent's argument that Mickens had failed to show "cause" for his default, finding that Saunders never volunteered the fact of his prior representation, state law generally makes juvenile records confidential, and federal habeas counsel "fortuitously" discovered the prior representation through a "clerk's mistake" while investigating Mickens' victim. Mickens, 240 F.3d at 356. The Respondent argued below that the information could have been equally available to state habeas counsel had that attorney raised any claims suggesting a need to investigate the victim's juvenile record. Notwithstanding Virginia's juvenile law confidentiality provisions, ***petitioner's own exhibits in the federal evidentiary hearing established that the fact of Tim Hall's juvenile charges was publicly known long before Mickens' trial.*** (Resp. App. 1-2, 14-15).

defaulted). See also Virginia Code §8.01-654.1 (capital habeas petitioners limited to one petition filed after certiorari denied on direct appeal). To demonstrate prejudice, Mickens "must shoulder the burden of showing not merely that the errors of his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982); Murray v. Carrier, 477 U.S. 478, 494 (1986).

The district court and the *en banc* Fourth Circuit majority evaluated prejudice by determining that Mickens' failure to prove his conflict claim on the merits resolved the issue. Mickens v. Greene, 74 F. Supp. 2d at 602; Mickens, 240 F.3d at 356-357. The panel majority also had assessed "prejudice" in terms of the merits of Mickens' claim but it held that Mickens could establish Frady prejudice simply by relying on the "presumed prejudice" of what it thought was a successful Sixth Amendment claim. Mickens, 227 F.3d at 210.

Because Mickens completely ignores the default posture of this claim, he has not argued in this Court that he can demonstrate prejudice under ***any*** theory. However, even assuming Mickens adopts the position of the panel majority, he still cannot demonstrate Frady prejudice. First, Frady specifically defines "prejudice" for defaulted claims and expressly differentiates it from the burden required to prevail on the merits of a preserved habeas claim, or even a defaulted claim on direct appeal. See Frady, 456 U.S. at 164, 169. *Notably, obtaining federal collateral relief for a* ***preserved*** *claim does not require meeting the significantly higher burden of demonstrating the actual and substantial prejudice that Frady requires for a* ***defaulted*** *claim.* See Brecht v. Abrahamson, 507 U.S. 619 (1993) (applying "substantial and injurious effect or influence" standard, not "harmless beyond a reasonable doubt" standard, for cases of constitutional trial error which are subject to harmless error review).

Second, the "presumed prejudice" required for Sixth Amendment claims that the panel majority borrowed from Sullivan, 446 U.S. at 349-350, simply is not the same as Frady prejudice. In United States v. Cronic, 466 U.S. 648 (1984), this Court allocated presumptive prejudice to the circumstances of outright absence, or prevention of the assistance, of counsel, id. at 659, at n. 25, but "[a]part from circumstances of that magnitude... there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors undermined the reliability of the finding of guilt" Id. at 659, n.26. The prejudice that is presumed when "counsel actively represented conflicting interests," Sullivan, 446 U.S. at 350, "is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims" described in Cronic. Strickland v. Washington, 466 U.S. 668, 692 (1984). This Court repeatedly has stressed that petitioner must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance," ***before*** presuming Sixth Amendment prejudice. Id.; see Sullivan, 446 U.S. at 350.

The panel majority's construction of prejudice would have permitted Mickens to obtain federal collateral relief, on a defaulted claim, without demonstrating ***any*** prejudice, ***or even*** the lesser showing of an "adverse effect." As a matter of established fact in this case, the district court found after a full evidentiary hearing that Mickens failed to demonstrate any "actual conflict" ***and*** failed to show any "adverse effect" on his lawyer's representation, thus precluding Mickens' attempt to claim the presumptive prejudice recognized for successful conflict of interest claims. Mickens does not argue in this Court that the district court's findings establishing that there was no actual conflict are clearly erroneous; indeed, he makes only a token effort at challenging the findings of the district court and the Fourth Circuit that he cannot show any "adverse effect."

Mickens undeniably has failed to satisfy the factual prerequisite for claiming any Sixth Amendment "presumed prejudice," much less for establishing the ***actual*** Frady prejudice independently required to overcome his default. Mickens' petition thus is singularly unsuited for review because it provides the Court no real opportunity to address the issues Mickens presents as if he had preserved them for review on direct appeal.

B. The District Court's Unchallenged Factual Findings Establish that Mickens Failed to Demonstrate the Existence of an "Actual Conflict."

Certiorari must be denied because it is an uncontested fact that no actual conflict existed in this case. The district court conducted a thorough evidentiary hearing in this case, made specific factual findings fully supported by the evidence and credibility findings, and found that Mickens failed to establish an "actual conflict of interest." No judge of the Fourth Circuit disputed any finding of the district court as "clearly erroneous," and Mickens does not assert even now that the district court's findings are subject to challenge on that ground. Instead, Mickens misstates the Fourth Circuit's decision below as assuming that an actual conflict had been established by the evidence, when in fact the *en banc* majority determined that "because we find that Mickens has failed to identify an adverse effect...we do not reach his argument that he has established an actual conflict of interest." Mickens, 240 F.3d at 360.[3]

[3] The decision not to address the finding of no "actual conflict" certainly does not mean the Fourth Circuit silently overturned the district court's factual findings. The court was not required to resolve both parts of Sullivan's two-part test when Mickens had failed to establish "adverse effect." See Dukes v. Warden, 406 U.S. 250, 256 (1972) (finding alleged conflict had not affected guilty plea). This is not an unusual approach to two-part tests generally, see Strickland v. Washington, 466 U.S. at 697 (reviewing court can decide ineffectiveness claim on lack of prejudice); Frady, 456 U.S. at 168 (unnecessary to determine "cause" when petitioner had failed to show "prejudice" from default), nor specifically in the Fourth Circuit's disposition of conflict claims. See Williams v. French, 146 F. 3d 203, 212 (4th Cir. 1998) ("Even if we assume the existence of an actual conflict, Williams has not established that any conflict adversely affected his counsels' performance.").

The Fourth Circuit's disposition does not suggest any concern with the district court's findings of fact. In its decision finding no "adverse effect," the *en banc* majority unambiguously ***upheld*** the district court's findings:

> Conflict claims present mixed questions of law and fact that we review de novo. The district court's factual findings, however, are subject to the clearly erroneous standard set forth in Rule 52(a), Fed. R. Civ. P. ***Because much of the adverse effect inquiry is heavily fact dependent, we believe appropriate deference should be given to the findings of the district court.*** In this respect, we note that a significant part of the evidence was taken orally, and the district judge saw the witnesses and heard them testify. We also note that the opinion of the district court was complete, thorough and thoughtful.

Mickens, 240 F3d at 360 (internal citation and punctuation omitted) (emphasis added). Because of the overlapping nature of "actual conflict" and "adverse effect," the Fourth Circuit majority also upheld findings supporting the district court's ruling that Mickens failed to demonstrate any "actual conflict." Mickens, 240 F.3d at 360-362. Significantly, even the dissenting judges below never found that the district court's findings were clearly erroneous.[4] Mickens appears to adopt the suggested "actual conflicts" advanced by the ***panel*** majority, but, like those judges he fails even to acknowledge the district court's factual findings that expressly preclude finding an actual conflict of interest existed.

The panel majority concluded that Saunders violated ethical obligations to explain to Mickens "any circumstances that might cause a client to question [counsel's] undivided loyalty," and to withdraw from representation if Mickens so desired. Mickens, 227 F.3d at 214-215. The

[4] The *en banc* dissent simply refers to the panel majority opinion regarding the issue of whether an actual conflict existed. Mickens, 240 F.3d at 369. Judge Michael's panel opinion criticized the district judge for placing "great weight" on Saunders' testimony concerning whether Saunders had perceived a conflict, yet nonetheless accepted the district court's credibility determination. Mickens, 227 F.3d at 214 ("because the district court took Saunders' testimony as truthful, so do we").

panel majority then enhanced the perceived ethical lapse by assuming, directly contrary to the district court's first-hand findings, that Saunders actually had developed a personal interest in *concealing* the fact of his earlier representation to avoid professional discipline and protect his reputation. The panel then simply announced: "Saunders was thus caught in an actual conflict." Id. at 215.

The district court's specific factual findings that Saunders had not developed any personal interest that conflicted with Mickens' interests was not simply crediting Saunders' denial of a conflict. The district court's specific and unchallenged factual findings which never even were mentioned by the panel, directly contradict the basic factual assertions underlying the panel's theory: the district court found that "Saunders never struggled with the ethical issues envisioned by Mickens." Mickens, 74 F. Supp 2d at 605. The district judge who had seen and heard Saunders found as a fact that Saunders was not animated by an ethical lapse:

> Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court concludes, ***as a factual matter, Saunders did not believe that any continuing duties to a former client might interfere with his consideration of all facts and options for his current client.***

Id. at 606 (internal punctuation omitted) (emphasis added).

> Saunders did not believe the Hall representation was a source of relevant information or potential conflicts for the Mickens case. Thus, as far as he was concerned, his perception ended the matter for all concerned: his client, the court, and co-counsel. ***The record does not demonstrate that Saunders' silence, albeit inexcusable, was attributable to Saunders' self-interest.***

Id. at 612-613 (emphasis added).

The panel majority purported to give these findings their due respect when it assumed Saunders' testimony was "truthful," but then proceeded to circumvent those very findings, effectively reweighing the testimony and making the exact opposite finding: that Saunders violated

ethical rules, feared sanctions, and had an interest in concealing his misconduct to the detriment of Mickens. Mickens, 227 F.3d at 215. Mickens cannot simply substitute the panel majority's speculative assertions lacking any evidentiary support for the credibility findings made by the district court who saw and heard the witness.

The panel majority also accepted Mickens' argument that Saunders' continuing duty to preserve the secrets and confidences of Hall "diverged from Mickens' interest in pursuing a course of action, specifically, a reasonable pre-trial investigation," Mickens, 227 F.3d at 216-217, which would have included investigating "negative information about Hall," the victim's "character and background," Hall's "tendency to violence or aggressiveness," and why Hall no longer lived at home. This information, together with the "notable location of Hall's murder," suggested to the panel majority potential defenses of consent to the sodomy and self-defense, which Saunders allegedly could not investigate because of his residual duty to protect Hall's confidences. Id. at 217.

The district court, however, after hearing all the evidence, expressly rejected this outlandish argument that can be considered only if the compelling facts of the murder – including the condition of Hall's body as shown in photographs taken of Hall laying on his stomach, bent over a mattress and stabbed 143 times – are completely ignored. (Resp. App. 3-8). Petitioner alludes to information from a local newspaper as describing the site where Mickens chose to murder Hall as one "used for homosexual trysts," and he asserts that the difficulty in reaching the location might suggest that Hall ***went there voluntarily***, all presumably to suggest the possibility of mounting a ridiculous "consent" defense to sodomy or that "negative

information" existed about Hall.[5] Pet. at 8. However, testimony in the evidentiary hearing described several methods of accessing the riverside at that location (Resp. App. 9-11) and, as the district court noted, Hall's body was found to have "choke-hold" type marks on his neck. Mickens v. Greene, 74 F. Supp. 2d at 607. The speculation about Hall's sexual activities was rejected in the district judge's explicit finding that even after "diligent investigation by federal habeas counsel," no evidence showed that Hall was a "male prostitute."[6] Mickens v. Greene, 74 F. Supp. 2d at 608.

The district court carefully considered and rejected the notion that any defense or mitigation strategy based on a theory of consent was in conflict with Saunders' loyalty to a former client or his duty to maintain a former client's confidences. Saunders had no information from Hall or any other source to support a theory of consent, and it certainly was not consistent with the evidence. As stated Hall's body exhibited over 140 stab wounds inflicted while he was bent over a mattress on his stomach. (Resp. App. 3-8). ***Most importantly, Mickens never suggested consent as a possible defense, but personally insisted on denying involvement in these crimes to his attorneys and in his own testimony, which precluded a consent defense.*** Mickens v. Greene, 74 F. Supp. 2d at 607. The district court's finding that Saunders rejected consent as a possible defense because it could not be supported by the facts and Mickens'

[5] Mickens also asserts that Saunders failed to investigate "leads" about other people who might have had a motive to murder Hall. He presented this allegation below as an example of an "adverse effect" and the district court found that there was no evidence connecting these leads to Saunders' representation of Hall. Mickens v. Greene, 74 F. Supp 2d at 612.

[6] Saunders' co-counsel, Keeling, had investigated before trial rumors about Hall reported in the local newspaper shortly after the murder. (Resp. App. 12-15). He spoke to people who lived in the area near Hall and others who knew Hall at his church, and ***was not able to find any evidence that Hall was a homosexual or "male prostitute."*** (Resp. App. 16-19, emphasis added).

testimony, and not because of any loyalty to Hall, cannot be deemed clearly erroneous and is quite obviously the truth.[7] Id.

Saunders was the lead counsel in the case but, as even the panel majority admitted, co-counsel Warren Keeling took the lead at the sentencing proceedings. Mickens, 227 F.3d at 208. The district court found that Keeling had investigated rumors about Hall based on the information in the newspaper articles published shortly after Hall's body was found. Mickens v. Greene, 74 F. Supp. at 608. Keeling was aware of Hall's reported assault on his mother, the weapon charge, and his living away from home, and he found nothing in that information worth pursuing for Mickens' defense. Id. Thus, not only did Saunders' knowledge of so-called "confidential information" about the fact of Hall's juvenile charges not create any actual conflict for Saunders, but Mickens cannot claim any denial of his Sixth Amendment rights because he also was represented by undeniably conflict-free counsel who had the responsibility to prepare for the sentencing, knew the relevant facts about Hall, and independently decided after investigation not to pursue so-called "negative information" about Hall. Id. Mickens, of course, has not acknowledged this evidence and the district judge's findings in this Court.

The limited information Saunders knew from Hall never had any connection to Mickens' case and the district court's findings confirm that Saunders never possessed any interest connected

[7] Petitioner ***now*** suggests that the district court could not rely on Mickens' own testimony which by itself precluded any theory of consent because it was produced in a trial where Mickens was represented by an attorney who allegedly could not use information unfavorable to Hall. He further suggests that Saunders otherwise might have counseled his client to forego testifying in an attempt to develop theories which Mickens has yet to suggest have any basis in fact. (Pet. at 10, n.10). The evidence presented to the district court, however, was uncontradicted: Mickens consistently denied involvement in these crimes or even knowing Tim Hall in his discussions with both of his lawyers and in his testimony, and ***Mickens*** insisted on exercising his right to testify. Mickens v. Greene, 74 F. Supp. 2d at 607.

to his prior representation of Hall that conflicted with representing Mickens' interests. Saunders thus was not "actively representing conflicting interests." Absent a showing of an "actual conflict," Mickens cannot demonstrate a Sixth Amendment violation even under the theory he asks this Court to embrace. Certiorari thus is inappropriate, not only because Mickens' claim is defaulted, but also because he asks for review of a legal issue that fails for want of proof of the predicate fact.

C. The En Banc Fourth Circuit Correctly Applied This Court's Precedents.

No compelling reason would exist for review of the Fourth Circuit's application of this Court's precedent governing conflict claims, even if Mickens' default and the district court's dispositive factual findings were ignored. Mickens' argument is fundamentally weak. It is that Wood v. Georgia, ***by omission***, overruled prior Sixth Amendment precedent which held that a defendant who fails to object at trial to circumstances possibly suggesting a conflict of interest must demonstrate that his attorney possessed an actual conflict of interest that adversely affected his lawyer's representation in order to show a Sixth Amendment violation.

At the time Wood was decided, this Court's precedents established certain well-defined requirements for a valid Sixth Amendment conflict of interest claim. In Holloway v. Arkansas, 435 U.S. 475, 488 (1978), the Court had concluded that a trial court's action improperly requiring joint representation over a timely objection deprived the defendants of their right to counsel and that "reversal is automatic" without regard to prejudice. Two years later, in Cuyler v. Sullivan, 446 U.S. 335 (1980), the Court addressed two issues expressly reserved in Holloway and decided that: (1)"Absent special circumstances," a trial court is not required to initiate an inquiry simply because of the joint or multiple representation. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry;" and, (2) ***When there is no objection at trial to multiple representation***, the defendant cannot

prevail merely by showing the possibility of a conflict, but must "demonstrate that an ***actual conflict of interest adversely affected his lawyer's performance***." 446 U.S. at 346-348 (emphasis added).

In Wood, a direct appeal case, the Court granted certiorari to decide the constitutionality of imprisoning probationers who failed to make installment payments on fines, 450 U.S. at 264, but declined to reach this issue and instead remanded the case for determination of a conflict of interest issue which had not been raised, briefed or argued, but which the Court itself identified in the record. The factual circumstances strongly suggested the possibility that the employer and the attorney representing the petitioners might have encouraged the petitioners' predicament in allowing imposition of fines beyond their means to pay as a way to create a test case on the constitutional issue.[8] If the attorney "was serving the employer's interest in setting a precedent," there was a "clear possibility of conflict of interest." Id. at 267-268. The Court announced that the case was remanded to the state trial court to hold a new revocation hearing if it found that an actual conflict of interest existed, and that it had not been waived. Id. at 273-274.

Strictly speaking, Wood is not a Sixth Amendment case. Wood, 450 U.S. at 273 ("we base our decision in this case on due process grounds"). Because the Court was confronted with a situation concerning counsel in a probation revocation hearing, the Sixth Amendment right to counsel could not be implicated, and the Court concluded that the employees possessed a due process right to counsel, which also included a right to conflict-free counsel. Id. at 271; see also Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process requires provision of counsel in some

[8] The state's attorney repeatedly had brought the potential conflict to the attention of the trial court, but the court conducted no inquiry into the issue. Wood, 450 U.S. at 266 n.5, 272; id. at 277 n.1 (White, J., dissenting).

contexts not included within Sixth Amendment grant). Wood's only comment on Sixth Amendment precedent in this area was the single mention of Sullivan in footnote 18 responding to Justice White's dissenting opinion, which had criticized the majority for using Sullivan to assume "jurisdiction over a claim otherwise beyond its reach:"

> Justice White's dissent states that we have gone beyond the recent decision in Cuyler v. Sullivan. Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, Sullivan mandates a reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists."

Wood, 450 U.S. at 272 n.18. (citation omitted).

Mickens adopts the view of the Fourth Circuit dissenting judges who saw Wood as addressing a different category of conflict of interest claims than that presented in Holloway or Sullivan, and decided it would be good for each category to have its own rule.[9] According to this argument, the circumstances of Wood where a trial court should know of a particular conflict but fails to inquire should fall somewhere between the automatic reversal rule of Holloway for claims preserved by objection to multiple representation, and the actual conflict/adverse effect rule of Sullivan for claims where no objection was made and the trial court lacked sufficient notice of a particular conflict to be obligated to inquire. Mickens, 240 F. 3d at 366. The dissenters below argued that the appropriate test for this intermediate case can be gleaned from the Wood remand order which they characterized as requiring only a showing of an actual conflict. The creation of this new sub-species of conflict claim and remedy, however, was based

[9] In the court below, Mickens initially argued that he was entitled to an "automatic reversal" because the state juvenile judge failed to inquire when she should have known of a particular conflict, without regard to a finding of actual conflict or adverse effect. The panel majority declined to reach this argument, Mickens, 227 F.3d at 212, n.3, and the *en banc* majority expressly rejected it. Mickens, 240 F.3d at 358-359, n.6. Only later on rehearing did Mickens adopt the panel majority's position concerning Wood.

on a flawed concept of subdividing tests that simply is not supported by this Court's precedent, not to mention an unauthorized exercise of new rule making on collateral review. See Gray v. Netherland, 518 U.S. 152, 166-167 (1996); Saffle v. Parks, 494 U.S. 484, 487-488 (1990).

This Court already had determined in Sullivan that the analysis of a conflict claim turned on whether the defendant had objected to the representation.[10] Mickens' argument that Wood created a new Sixth Amendment standard is constructed awkwardly by hypothesizing that in Wood the Court was answering a question left open in Sullivan concerning the standard for assessing "knew or should have known" conflict claims. Because Mickens spies different formulations of a standard for assessing conflicts in the two opinions, both written for the Court by Justice Powell, he concludes that the Court must have been announcing new law.[11]

Wood was a fractured decision and clearly dealt with a remarkable factual circumstance. Most significantly, it involved parties who had not briefed, or even asserted, a conflict of interest as grounds for relief. In these unusual circumstances, the Court's instruction to the inferior court unfortunately was imprecise in its treatment of Sixth Amendment precedent. The footnote

[10] The Court's opinion in Sullivan never even hinted at some intermediate standard allowing a demonstration of an "actual conflict" alone as sufficient to establish a Sixth Amendment violation if a trial court fails to inquire into an "apparent" conflict. In a dissenting opinion, Justice Brennan indicated that the burden of proving that a defendant's representation "was not actually affected by the possibility of conflict" should be shifted to the State when a trial court fails to inquire into possible conflicts in multiple representation. See Sullivan, 446 U.S. at 354 (Brennan, J.). Justice Marshall indicated that he would jettison the "adverse effect" requirement for a defendant who failed to object to multiple representation because it is unnecessary and often impossible to prove. Sullivan, 446 U.S. at 356-357 (Marshall, J., dissenting).

[11] In addition to authoring the Court's opinions in Sullivan and Wood, Justice Powell also wrote separately in Holloway v. Arkansas, ***disagreeing*** with the Court's presumption of prejudice from the failure to conduct an inquiry into a possible conflict brought to the trial court's attention. 435 U.S. at 492. There, Justice Powell suggested that the remedy for such a failure was to shift to the State the burden "to establish the improbability of conflict or prejudice." He did not espouse doing away with a prejudice inquiry. Id. at 496.

containing the only reference to relevant precedent asserted that Sullivan "mandated a reversal" in the circumstances there presented, when in fact Sullivan only mandated "automatic reversal" for Holloway claims, i.e., where the trial court refuses to consider timely objections asserting conflicting interests. Sullivan, 446 U.S. at 345. Sullivan set up a different standard only for cases where the defendant did not object at trial. Id. at 348-349. If Sullivan in fact ***had*** required reversal when a trial court failed to inquire into possible conflicts of which the court should have known, then the remand order in Wood directing the trial court to determine whether an "actual conflict" existed, after this Court already had determined that the conflict was sufficiently apparent to necessitate inquiry, would have been entirely superfluous.

The Fourth Circuit majority properly concluded that Wood should not be read to alter existing law. Indeed, the lack of precision in discussing the precedential basis for the remand order in Wood is an affirmative indication supporting the Fourth Circuit's conclusion that this Court simply was applying established law, and not announcing new tests without briefing, argument or even discussion in the Court's opinion. As the *en banc* majority properly observed, Wood did not find that a constitutional violation was established, and that fact alone contradicts reading footnote 18 as stating a rule of automatic reversal. Mickens, 240 F. 3d at 359.

The court below also correctly rejected Mickens' argument that Wood eliminated ***by implication*** Sullivan's requirement that he show an "adverse effect" simply because Wood omitted a specific reference to that term in the remand order. Mickens, 240 F. 3d at 359-360. The Fourth Circuit correctly observed that the actual discussion of the conflict claim in Wood demonstrates convincingly that the Court's use of the term "actual conflict" referred broadly to an actual conflict and its effects on the petitioners' representation:

> [T]he Wood Court noted that "on the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." Wood, 450 U.S. at 272. If defense counsel had been so influenced, the Court stated, the due process rights of petitioners were not respected." Wood, 450 U.S. at 272. After these observations, the Court concluded that it was difficult "to determine whether an actual conflict of interest was present." Wood, 450 U.S. at 272. Those comments underscore that the Court was searching the record not just for a conflict of interest, but also for some indication that the conflict adversely affected the attorney's representation of the defendants. When read in this light, the Wood Court's terse instruction to the trial court on remand simply cannot bear the constitutional weight Mickens ascribes to it.

Mickens. 240 F. 3d at 360. See also Wood, 450 U.S. at 268, n.14 ("There is also a danger that petitioners' lawyer was influenced in his strategic decisions by other improper considerations.").

Twenty years ago, when Wood was decided, the meaning of the terms, "actual conflict" and "adverse effect," still were being fleshed out. Even then, as Justice Marshall noted in his dissent, "'[c]onflict of interest' is a term that is often used and seldom defined." 446 U.S. at 356, n.3. Sullivan itself did not attempt to define the terms fully or separately, but observed that an actual conflict was shown to have "impaired the defense" in Glasser, and not to have caused an "actual lapse in representation" in Dukes v. Warden, 406 U.S. 250, 256 (1972). See Sullivan, 446 U.S. at 349. The Court's discussion rejecting Sullivan's claims mixed what courts now likely consider as "adverse effects" into the calculus of "actual conflict." See Sullivan, 446 U.S. at 347-348 (considering "counsel's critical decision to rest Sullivan's defense" as a facially "reasonable tactical response to the weakness of the circumstantial evidence presented by the prosecutor," in determining whether a conflict was suggested).

As the Fourth Circuit majority correctly recognized, "the two requirements of the Sullivan test, 'an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analysis of them overlap.'" Mickens, 240

F.3d at 361, quoting United States v. Tatum, 943 F.2d 370, 375 (4th Cir. 1991). Thus, it certainly is not surprising that Wood referred to incidents of "influences" on counsel's actions interchangeably with its concern over an "apparent" conflict. Wood obviously used the term "actual conflict" as "shorthand" for the Sullivan test, as the Fourth Circuit reasonably concluded. Certainly the mere omission of an explicit reference to "adverse effect" under the unusual circumstances presented in Wood did not mean that the Court intended to ***overrule*** the established Sullivan standard that was not even mentioned in the Court's opinion. Mickens, 240 F.3d at 360.

The new test Mickens discerns in Wood had no history before Wood; it certainly never was suggested in Holloway or Sullivan. There is a complete absence of any discussion of reasoning in Wood that would prompt the Court to choose only one part of Sullivan's two-part test as its new standard, and to select "actual conflict" over "adverse effect" as the appropriate measure. Wood did not announce a new standard nor silently overrule the old. This Court never has suggested that Wood altered pre-existing Sixth Amendment precedent sub silentio. In Strickland v. Washington, 466 U.S. at 692 – decided three years ***after*** Wood - the Court expressly reaffirmed Sullivan's actual conflict/adverse effect requirement for defendants who raised no objection at trial, without ever hinting that this standard was subject to further subdivision in other circumstances. The Fourth Circuit's decision to apply clear precedent and to forego the hypertechnical reconfiguration of Sixth Amendment law offered by Mickens in this collateral case simply presents no question worthy of certiorari review.

D. Mickens Failed To Demonstrate That The Trial Court, Or The State Juvenile Court, Knew Or Should Have Known Of A Particular Conflict.

Mickens does not and cannot assert that the ***trial judge*** in his case ever had any duty to inquire into the possibility of a conflict of interest. The circuit court judges who presided over Mickens' 1993 trial and 1996 resentencing are not alleged to have had any knowledge of the facts underlying Mickens' conflict claim. Rather Mickens focuses exclusively on Judge Foster of the Newport News Juvenile and Domestic Relations Court.[12] The en banc Fourth Circuit "accept[ed] for purposes of discussion, without deciding the issue, that Judge Foster reasonably should have known that Saunders labored under a potential conflict of interest arising from his prior representation of Hall." Mickens, 240 F.3d at 357.

Mickens stresses that trial courts have a constitutional duty to inquire into the possibility of conflict of interest, but he fails to explain the authority that would place a trial court's obligations on a juvenile court judge who exercises only limited authority over preliminary stages of the criminal proceedings. The responsibility for assuring that trial proceedings are conducted with complete regard for the defendant's ***trial*** rights properly rests on the ***trial*** judge. See Holloway, 435 U.S. at 484 ("'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused....The trial court should protect the right of an accused to have the assistance of counsel'"), quoting Glasser v. United States, 315 U.S. 60, 71 (1942). The juvenile court in Mickens' case, by contrast, had the much more limited function of conducting a probable cause hearing. Mickens' attempt to create a new obligation on

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[12] Judge Foster was the presiding judge on April 3, 1992, when Timothy Hall's juvenile charges were dismissed after his death, and appointed Saunders on April 6, 1992, to represent Mickens for the capital murder of Hall. Judge Foster had not appointed Saunders to represent Hall; rather that appointment was made by a different, substitute juvenile judge. Mickens v. Greene, 74 F. Supp. 2d at 599-600, 613-614.

"the judge appointing counsel" – especially, as here, one who had not made the prior appointment regarding Hall – without regard to what stage of the proceedings the appointment is made, certainly is not dictated by precedent and obviously would require creation of an impermissible new rule. See Gray, 518 U.S. at 166-167; Saffle v. Parks, 494 U.S. at 487-448.

Even a trial court's "duty to inquire" is limited to those circumstances where a timely objection is made, Holloway, 435 U.S. at 484, or where "the trial court knows or reasonably should know that a *particular* conflict exists." Sullivan, 446 U.S. at 347 (emphasis added). And, in the context of multiple representation cases, this Court has held that the mere knowledge that one attorney represents several defendants is not sufficient to trigger that duty. Id. at 346. Something more, such as "special circumstances" or knowledge of "a particular conflict," must be shown before the trial court is constitutionally obligated to inquire. Id. at 346-347.

Mickens fails to establish the existence of any "special circumstances." The most generous assumption about what Judge Foster reasonably should have known is that Saunders previously represented Hall, that that representation had been concluded prior to any judicial proceeding, and that Saunders was appointed to represent Mickens for the capital murder of Hall.[13] However, because there is no simultaneous or even overlapping representations,

[13] Assuming even this much knowledge is highly speculative. Mickens chose not to offer any direct evidence of what Judge Foster knew. He relied on the fact that on April 3, 1992, Judge Foster filled in only the last entry on a form docket sheet that already contained Hall's name, listed two charges, and listed Saunders as Hall's attorney, among other entries and blanks for recording information about the case. With the exception of that last entry by Judge Foster, the information contained on the form obviously was recorded by another judge or clerk's office employees. (Resp. App. 20). Hall's case never was called in open court. Saunders recalled arriving at the courthouse and learning about Hall's death, but most likely from a clerk, not in court, and not from any judge. Mickens v. Greene, 74 F. Supp. 2d at 613-614. Three days later, on Monday, April 6, 1992, Judge Foster appointed Saunders to represent Mickens.

Mickens' case suggests even less reason to inquire into possible conflicts than the circumstances of a multiple representation.

Mickens also failed to demonstrate that the juvenile judge should have known of any "particular conflict." He argued below that Judge Foster must have been aware of publicity concerning Hall's murder, and he asserts that the ***juvenile*** court judge should have recognized the likelihood that Mickens' defense in a capital murder penalty phase proceeding in the ***circuit*** court would require countering evidence about the victim and victim impact evidence.[14] These might be matters that could be attributed to the knowledge of a ***trial*** court in an appropriate case because trial courts do have the opportunity to become familiar with the allegations and evidence in pre-trial proceedings and may have experience in capital murder trial and sentencing procedures. But a juvenile court's exposure to a criminal case in the circumstances presented in Mickens' case is too limited to presume familiarity with facts and legal proceedings far beyond that judge's experience.

Mickens failed to present ***any evidence*** of the juvenile judge's exposure to publicity, and the juvenile court judge, as a matter of law, never would be involved in a capital murder sentencing proceeding. It is not even plausible to hold a juvenile court judge responsible for forecasting what evidence that defendant might choose to present in a circuit court trial if, in fact, the case ever proceeds to a sentencing phase. And it would have required remarkable prescience for Judge Foster to be able to predict that years after her involvement in Mickens' case, the Virginia General Assembly would enact legislation allowing the use of victim impact statements

[14] The district court accepted these reasons in concluding that Judge Foster had a duty to inquire into the possibility of a conflict. Mickens, 74 F. Supp. 2d at 614. To the extent that these reasons represent findings of fact, the Respondent asserts, as he did below, that they were "clearly erroneous."

for the final judge-sentencing proceeding, 1993 Va. Acts of the General Assembly, Chapter 978, and permitting victim family testimony. 1998 Va. Acts c. 485.[15] The juvenile court judge's limited involvement in Mickens' case provided no opportunity for that judge reasonably to have known of any "particular conflict," and Mickens' failure to prove circumstances that would have required an inquiry independently defeats his Wood v. Georgia claim.

E. Mickens Has Failed To Identify Any Division Among The Federal Circuits Or State Courts Concerning Applications Of Wood v. Georgia That Compels Review In His Case.

Even if Mickens' "split" argument had force, it could do nothing to convert his defaulted, fact-bound and fact-precluded claim into a "cert-worthy" legal issue. However, even his "split" argument is groundless. Mickens asserts that the decision of the *en banc* majority holding that Mickens must demonstrate that an actual conflict of interest adversely affected his lawyer's representation, is in conflict with decisions of other federal courts of appeals and state courts addressing similar issues. The conflicts in authority that Mickens identifies are either non-existent or based on circumstances completely inapposite to Mickens' case.

The Second Circuit has applied Wood and Sullivan as stating a rule of automatic reversal whenever a trial court fails to conduct an inquiry where it has sufficient notice of a "possible conflict." See United States v. Rogers, 209 F.3d 139, 143-144 (2d Cir. 2000) ("When a possible conflict has been entirely ignored, reversal is automatic."); Ciak v. United States, 59 F.3d 296, 304 (2d Cir. 1995). The Second Circuit's rule requires reversal without regard to whether the defendant can show an "actual conflict" ***or*** an "adverse effect." See Rogers, 209 F.3d at 144, 146.

Of course, neither Sullivan nor Wood announced a rule of automatic reversal for failure to inquire into a "particular conflict" much less the mere "possibility" of a conflict. Sullivan explicitly stated that the trial court is not obligated to inquire into every possibility of a conflict. 446 U.S. 346. And Wood did not apply the "mandated reversal" rule the Second Circuit mistakenly attributes to Sullivan. Additionally, to the extent that the Second Circuit would do away with any requirement that a defendant show an "actual conflict," its rule ignores even the new standard Mickens and the Fourth Circuit dissenting judges discern from the remand order in Wood.[16] The Second Circuit's rule appears to be in direct conflict with Sullivan and Wood, and stands alone among the other authority Mickens has collected. That conflict between the Second Circuit and this Court, however, certainly provides no reason for the Court to review the ***Fourth Circuit's*** correct application of this Court's precedents. If the Court determines that it should flesh out conflict of interest law in any manner, it should select a case on direct appeal from a circuit such as the Second where the clear holding in Sullivan has been so altered.

Mickens' argument that the Fourth Circuit's decision is at odds with Atley v. Ault, 191 F.3d 865 (8th Cir. 1999), moreover, is simply wrong. Atley quotes footnote 18 from Wood, but because the case involved the adequacy of the trial court's resolution of the trial attorney's motion

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[15] Although Payne v. Tennessee, 501 U.S. 808 (1991), pre-dated the juvenile court's involvement in Mickens' case, the Virginia Supreme Court did not approve the admission of such evidence in a Virginia trial until November 1994, after Mickens' trial. See Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994). Of course, the Commonwealth did not present victim impact evidence during the 1993 sentencing, and only the victim impact statement required by the intervening change in state law was presented in the final judge sentencing in 1996.

[16] Mickens also cites United States v. Malpeidi, 62 F.3d 465 (2d Cir. 1985) as an example of a Second Circuit case where the court reversed on the basis of an "actual conflict" without a showing of adverse effect. Malpeidi, however, presented only a straightforward Sullivan claim, alleging a conflict of interest, and the court found no "lapse in representation," apparently meaning "adverse effect." Id. at 469.

to withdraw because of a conflict, Atley definitely is a Holloway case. 191 F.3d at 871 ("the issue before this Court is whether the Iowa Supreme Court's ruling on the adequacy of the trial court's inquiry constitutes a reasonable application of the rule announced in Holloway). Atley simply does not address the potential conflict in Mickens' case.

As Mickens acknowledges, the Seventh Circuit decisions offer several formulations of a standard for similar conflict claims, some of which presume prejudice if a trial court fails to inquire into a possible conflict after receiving notice. None of the cases Mickens cites, however, were resolved in a manner inconsistent with the decision of the Fourth Circuit. See Cabello v. United States, 188 F.3d 871, 875 (7th Cir. 1999) (trial court was not aware of potential conflict in undisclosed third party fee arrangement; no prejudice to representation shown); Lipson v. United States, 233 F.3d 942, 946 (7th Cir. 2000) (trial court not on notice of fee paid by another; lawyer gave Lipson adequate representation); United States v. Pergler, 233 F.3d 1005, 1010 (7th Cir. 2000) (trial court adequately investigated notice of potential conflict); Holleman v. Duckworth, 155 F.3d 906, 911 (7th Cir. 1998) (uncertain claim of conflict of interest remanded to district court for hearing); United States v. Shorter, 54 F.3d 1248, 1253 (7th Cir. 1995) (presumption of prejudice if defendant shows possible prejudice after trial court fails to inquire into possible conflict); United States v. Horton, 845 F.2d 1414, 1418 (7th Cir. 1988) (no claim of conflict presented to trial court; claim addressed under Sullivan and no conflict or adverse effect); United States v. Fish, 34 F.3d 488, 492 (7th Cir. 1994) (objection raised at trial and court conducted adequate inquiry).

The Ninth Circuit decision Mickens cites actually confirms the Respondent's position. In Garcia v. Bunnell, 33 F.3d 1193 (9th Cir. 1994), the court considered a federal habeas petitioner's claim that the trial court had failed to conduct an adequate inquiry into the possible

conflict of interest reported by his attorney to the trial court. Although the Ninth Circuit determined that the trial court should have conducted an inquiry, it denied relief because the prisoner had received an evidentiary hearing in federal court in which it was established that no actual conflict existed, and there was no suggestion the representation was "influenced." Id. at 1199-1200.[17]

Mickens concedes that the decision in his case is in accord with decisions of the First, Tenth, and Eleventh Circuits. See Mountjoy v. Warden, New Hampshire State Prison, ___ F.3d ___, 2001 U.S. App. LEXIS 5442 (1st Cir. 4/3/2001); United States v. Winkle, 722 F.2d 605, 611-612 (10th Cir. 1983); Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999) (*en banc*). Indeed, the decisions in Winkle and Mountjoy involve reasoning and results remarkably similar to Mickens' case. In Winkle, the Court remanded the case for a hearing to determine whether the defendant could show that an actual conflict adversely affected his defense in response to the claim that the trial court failed to inquire into a conflict that was brought to the court's attention. Winkle, 722 F.2d at 611-612. And in Mountjoy, the First Circuit reaffirmed its rule that "in light of Wood, automatic reversal is not required if a trial judge holds a post-trial hearing about whether an actual conflict developed that adversely affected counsel's performance, the standard for reversal under Sullivan." 2001 US App LEXIS 5442 at *18.[18]

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[17] Mickens also points to several state court direct appeal cases in which the courts identify mandatory reversal rules based on Sullivan and Wood when a trial court fails to inquire into a possible conflict and an actual conflict can be shown. (Pet. 21-23). However, creating and even applying such rules on ***direct appeal*** is not in conflict with the decision in this federal habeas corpus case.

[18] The First Circuit, like the Fourth Circuit *en banc* majority, previously concluded that the remand in Wood for a hearing contradicted an automatic reversal rule. See Brien v. United States, 695 F.2d 10 (1st Cir. 1982).

Thus, contrary to Mickens' argument, there are few and minor variations among the circuits and States concerning the standard for assessing Wood claims. Those variations consist, at most, in subtle differences in ***describing the standards*** this Court has announced, not ***in applying differing standards to produce inconsistent results***. Obviously, Mickens has grossly exaggerated his claims of conflicting authorities, and he has failed to suggest any need for this Court to grant review in Mickens' case to resolve any substantial conflict in the application of federal law.

II. MICKENS' ARGUMENT THAT THE FOURTH CIRCUIT ERRONEOUSLY REJECTED HIS CLAIMS OF "ADVERSE EFFECT" DOES NOT MERIT THIS COURT'S REVIEW.

A. The Circuits are in Essential Agreement in the Understanding of an Actual Conflict Adversely Affecting Counsel's Representation.

The court below applied the Fourth Circuit's established standard for assessment of an "adverse effect:"

> A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another. Thus, both taking action and failing to take actions "that are clearly suggested by the circumstances" can indicate an adverse effect.

Mickens, 240 F.3d at 360 (citations omitted). The *en banc* majority further approved the district court's three-part analysis that focused particularly on the circumstances of a successive representation:

> First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision....[T]he petitioner must show that the alternative strategy or tactic was "clearly suggested by the circumstances." Finally, the petitioner must establish

> that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict

Mickens, 240 F.3d at 361 (internal citation omitted).

Mickens argues that the final requirement of this test is inconsistent with the law of every circuit but the Eleventh Circuit.[19] He asserts that obligating a petitioner to prove a "link" between the alleged conflict and counsel's failure to pursue the strategy imports a subjective inquiry into counsel's motivations. Mickens thus misstates the decision below in order to claim a split among the circuits that simply does not exist.

Mickens concedes as he must that Sullivan's test of an actual conflict of interest that adversely affected the attorney's representation, 446 U.S. at 348-349, by definition requires a "link." "This is implicit in the very concept of adverse *effect*." Pet. at 33. And every decision from the courts of appeals that he mentions recognizes a "link" requirement. See United States v. Fahey, 769 F.2d 829, 836 (1st Cir. 1985) (the plausible strategy not pursued must be "inherently in conflict" or "not undertaken due to the attorney's other loyalties or interests");[20] Lipson v. United States, 233 F.3d at 946 (petitioner must "suggest something that he did that he should not have done, or something that he failed to do that should have been done, that had a negative impact" on petitioner's case); United States v. Migliaccio, 34 F.3d 1517, 1526 (10th Cir. 1994) (adverse effect demonstrated if "a specific and seemingly valid or genuine alternative strategy was available to defense counsel, but it was inherently in conflict with his duties to

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[19] The district court and the *en banc* majority adopted the three-part analysis the Eleventh Circuit set out in Freund v. Butterworth, 165 F.3d at 860.

[20] Mickens notes that Fahey also has been adopted as the standard for adverse effect in the Second and Third Circuits. See United States v. Morelli, 169 F.3d 798, 810 (3d Cir. 1999); Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993).

others or his own personal interests"); United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992) ("the defendant need only show that some effect on counsel's handling of particular aspects of the trial was 'likely.'").

The Fourth Circuit's statement of a requirement that counsel's failure to pursue an alternative strategy must be "linked" to the alleged actual conflict is not different than saying that counsel's failure to pursue a strategy was "inherently in conflict with," or "due to" his diverging interests. Mickens has argued that the Fourth Circuit applied the "adverse effect" standard to conduct an inquiry into defense counsel's subjective "motivation," but the record does not support that allegation.[21] And notwithstanding Mickens' erroneous argument that the Fourth Circuit misapplied its own standard, the "adverse effect" requirement of a "link" between the effect and the conflict is not inconsistent with any circuit authority Mickens presents. Thus, Mickens' case fails to present any important issue of federal law which has divided the circuits.

[21] Mickens attempts to reduce the *en banc* majority and district court's findings of no "adverse effect" to the statements that Saunders had not perceived any ethical conflict in representing Mickens and "did not refrain from taking any actions" because of his prior representation. Mickens v. Greene, 74 F. Supp. 2d at 606, 612. Neither of these statements, however, was relied upon by the courts below as the evidentiary basis for rejecting Mickens' asserted "adverse effect." The district court's determination that Saunders did not perceive an ethical violation certainly was relevant to Mickens' assertion that Saunders possessed a conflicting personal interest. Because Mickens asserted a conflict based on Saunders' motivation to conceal ethical lapses, the district court appropriately determined that Saunders did not in fact recognize such ethical lapses much less act on them. Mickens v. Greene, 74 F. Supp. 2d at 605-606. Mickens' further argument that the courts below also erroneously relied on Saunders' credibility in rejecting the claim of an "actual conflict" in failing to investigate Hall's background is factually incorrect. This alleged conflict was found insufficient without regard to Saunders' testimony. See pp. 18-21. More significantly, it has nothing to do with an alleged split of authority concerning the adverse effect standard.

B. *The Fourth Circuit Correctly Found that the Alleged Conflict of Interest did not Adversely Affect Mickens' Case.*

Mickens argues that the Fourth Circuit erroneously relied on a trial record produced by "conflicted" counsel in rejecting his claimed "adverse effects," and that the court below effectively required that the adverse effect also must amount to attorney incompetence. Again, Mickens misstates what the courts below decided. The Fourth Circuit upheld the district court's factual findings as "not clearly erroneous" and agreed with the district court that Mickens' assertions of an "adverse effect" were inadequate in several instances because he failed to present viable alternative defense strategies, and the viable strategies Mickens had identified bore no connection to the alleged conflict of interest. Mickens, 240 F.3d at 362.

The district court rejected Mickens' claims concerning counsel's failure to investigate and present a "consent defense" because it was not a viable defense. The evidence established that Hall had been subjected to a choke-hold and stabbed 143 times before or during the attempted sodomy while laying on his stomach bent over a mattress. Mickens personally denied ever meeting Hall and never suggested any support for a defense of consent. Mickens v. Greene, 74 F. Supp. 2d at 606-607. The Fourth Circuit upheld these factual findings as not clearly erroneous. Mickens, 240 F.3d at 361.

Mickens' argument that the district court and Fourth Circuit improperly relied on his own testimony as a basis for rejecting the claimed adverse effect is puzzling and wrong. Of course the district court properly considered Mickens' testimony in determining whether a factual basis

existed that could make "consent" a viable alternative strategy. Mickens' testimony, which confirmed what Mickens told his lawyers, ***established that he could not claim consent***.[22]

Mickens also challenges the Fourth Circuit's conclusion that "[c]hoosing not to vilify the mother of the victim cannot be the mark of incompetent counsel by any measure." Mickens, 240 F.3d at 362. He appears to assert that this statement rejects the "adverse effect" claim because it would not otherwise state a claim of ineffective assistance of counsel. In fact, the Fourth Circuit upheld the district court's factual findings that a strategy of negative attacks on Hall or his mother simply was not a "reasonable alternative strategy or tactic," Mickens v. Greene, 74 F. Supp. 2d at 608. See Mickens, 240 F.3d at 362. More significantly, the Fourth Circuit also expressly upheld the district court's findings that unconflicted co-counsel "was primarily responsible for the sentencing hearing, was aware of this [negative] information, and made the decision not to use it at the sentencing hearing; so this strategic decision was unrelated to Saunders' conflict of interest." Mickens, 240 F.3d at 362.[23]

The district court's factual findings, upheld by the Fourth Circuit, establish that Mickens

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[22] Mickens' disturbing suggestion that unconflicted counsel might have persuaded Mickens not to testify, and then have argued "consent," seems to imply that defense counsel should pursue defenses entirely contradicted by their client's own statements. That certainly is not consistent with this Court's stated understanding of counsel's duties. Strickland, 466 U.S. at 691. In any event, as the courts below found, the facts of the murder did not make consent a viable alternative strategy.

[23] Mickens' claim that a conflict prevented Saunders from using "consent" to persuade the prosecutor to offer a plea bargain correctly was rejected. The uncontradicted evidence demonstrated that the prosecutor would not plea bargain Mickens' case. Mickens v. Greene, 74 F. Supp. at 609. There was no evidence of consent. Moreover, the so-called "confidential information" about Hall's prior juvenile charges had been fully exposed in the local newspaper, and hence was not a bargaining point.

failed to demonstrate any adverse effect, and these findings present no compelling reason for review as this Court previously has made clear in similar circumstances:

> Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case. Nevertheless, when the lower courts have found that a lawyer has performed his or her solemn duties in such a case at or above the lower boundary of professional competence, both respect for the bar and deference to the shared conclusion of two reviewing courts prevent us from substituting speculation for their considered opinions. The district judge, who presumably is familiar with the legal talents and character of the lawyers who practice at the local bar who saw and heard the witness testify, is in a far better position than we are to evaluate a charge of this kind, and the regional courts of appeals are in a far better position than we are to conduct appellate review of these heavily fact-based rulings.

Burger v. Kemp, 483 U.S. at 785. Because the factual findings establish the absence of an adverse effect, and under the correct standard, the Court should not grant certiorari to review Mickens' "adverse effect" arguments.

CONCLUSION

The application for a stay of execution and petition for a writ of certiorari should be denied.

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RESPONDENT'S APPENDIX

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Newspaper article (4th Cir Joint Appendix 2081-2082).....1

Commonwealth's Exhibit 4a (Mickens I Joint Appendix 369).....3

Commonwealth's Exhibits 3A-3E (Mickens III Joint Appendix 151-155).....4

Saunders' testimony, federal hearing (4th Cir Joint Appendix 1855-1857).....9

Keeling's testimony, federal hearing (4th Cir Joint Appendix 1702-1709).....12

Newport News juvenile court order
(Record, E. D. Va., following Order publishing at R.23).....20

"We will build the right facilities at the right time," DuVal said during a ceremony to kick off the 1992 Education Fair at Patrick Henry Mall. "We'll build them when they're needed and where they're needed."

the board adopts that capital plan. He said it contributed to the "principle" of building facilities when needed.

The mayor also said the councilmen are committed to "do our part at the local level" to fund the academic programs needed in Newport News. The School Board recently adopted a $140 million budget for the upcoming year that would require an additional $2.76 million in local funds, but the budget must be approved by the council. City Manager Edgar E

ceremony by incoming Superintendent Eric J. Smith, who begins work April 13. Smith was in town from Danville, where he has been superintendent for two years.

Smith told the 150 or so people in the crowd at Patrick Henry Mall that one of the most important factors in ensuring a suc-

DuVal an
hand to kick
at Education
features inter
partnerships
Newport New
local business
open Thursd
at Patrick He

Quest ends in death

A mattress sat Tuesday under a concrete slab that juts out from behind the former Basic Construction Co. at 29th Street and the James River in Newport News. The body of a 17-year-old male was found there Monday.

Bobby Harris Daily Press

Teen sought a home, normal life, friends say

By Cheryl L. Rose
Daily Press

NEWPORT NEWS

Trying to eke out a normal life as a homeless teen-ager, 17-year-old Timothy Hall hung out with neighborhood teens and slept on friends' couches.

What didn't fit in as normal, friends say, were the mysterious appointments he kept. Though his friends never pressed for an explanation, now they think one of those liaisons led to his stabbing death.

"He had the attitude he was going to live forever," said Alicia Thrash, whose 18th birthday party Hall was to attend Saturday night. He never arrived.

Friends say Hall had promised to go to the party — after he met with someone he never named.

Hall was not seen or heard from until his body was discovered Monday afternoon along the rocky shoreline near 29th Street. A man found Hall underneath a concrete slab that juts out from behind the former Basic Construction Co. building, police said. Hall's partially clothed body was found face down on a tattered mattress beneath a piece of plywood, police say.

On Tuesday, seven of Hall's closest friends skipped school and gathered to talk about the murder and the events in their friend's life that may have led to his death.

One thing that angered his friends was that people might think Hall was a homosexual because his body was found in a place where male prostitutes frequent.

"He wasn't gay," Trina Hall adamantly said. "He was mellow. I know he owed some old friends some money, but I can't think of any reason why someone would want to do that to him."

Adults who often fed Hall describe him as homeless because he depended upon their generosity and never knew whether he was welcome at his mother's house. He spent his life living with a series of foster parents, his adult sister, other relatives and friends. Because he roamed around so much, he wasn't able to collect a Social Security check until recently when he listed a friend's house on 28th Street as his permanent address.

The checks hadn't started arriving, the friends said, but suddenly Hall had money — and excuses.

Alicia Thrash said Hall would be at her house and would suddenly say he had to leave.

"He would get up for a couple of hours and come back," she said. "He would say he was broke, then he would come back and have money. And he started having new things, like new shoes."

About the same time, she said, Hall

Please see Teen/B7

Death came in a cold, distant place

By David Chanatry
Daily Press

NEWPORT NEWS

Underneath a mass of concrete behind the old Basic Construction Co. building at the end of 29th Street is a world removed from comfort.

Vagrants, wimos, street people, drug addicts, prostitutes and runaways frequent the area, according to people who live nearby.

Vagrants use the lot and its crevices as shelters to escape the elements, residents claim.

"They live under there, different street people," said Florence White, who manages the nearby St. James Terrace Apartments, a 100-unit brick complex on the adjoining lot.

The body of 17-year-old Timothy J. Hall was found on a blood-soaked mattress in one of the crevices Monday. He had been stabbed to death.

Peace symbols, the words "Love" and "Peace" and other graffiti, including a message "Do You Want to Die," are scribbled

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By Mathew Paust
Daily Press

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DEPOSITION EXHIBIT
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Brown turns contributors into campaign agent

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RESP. APP. 1

...International Airport on Tuesday. Two years ago Caroline, a student at Denbigh High School, stayed with Birgit in Germany. They have been pen pals since then.
Bobby Harris/Daily Press

outsider. They point to Brown's recent fund-raising activities as chairman of the Democratic Party in California, where he raised mil-

work with Mother Teresa and the poor in India.

"It amazed me that any politician would humble himself to feed and

"I ... he's ... inside, and he ... it went again... he's speaking ... said.

Spencer

Continued from B1

"I had been working at a bank and going to school part time," she said. "I wanted to go back to school full time. I met someone who told me about engineering."

Three-and-a-half years later Martinez had an engineering degree from Old Dominion University.

She doesn't think girls of today should have to wait as long as she did to discover the interesting and lucrative careers available in math and science. So she started "Bridges to Tomorrow."

"I don't think it's because of genetics that only 5 to 10 percent of engineers are women," Mart'nez said. "You have to have poten tial. Parents play a major role. Kids n ed motivation."

The best motivator, Martinez decided, was to show girls what they could do with ...

"Girls are ... said, "because ... models."

On April 23 ... they will.

Registration ... to Tomorrow: ... matics and Sci... tributed this w... middle school ... school teachers ... For further ... 583-8121.

Teen

Continued from B1

stopped accepting money from friends.

"I think that maybe he was hustling some guys. He just picked the wrong guy," she said, adding that she thought he was having sex with men for money but preferred women. She said he was dating one of her closest girlfriends.

Police told the family Hall lived with that his death was sexually related, Alicia said. Police have refused to comment about the case and say they don't have any suspects, but sources say Hall died from multiple stab wounds.

Whenever friends teased Hall about having sex with men, he'd deny it, Alicia said.

"He was ashamed about it but desperate and needed to get by," she said. "Sometimes he would get depressed and desperate. He would be crazy. The pressure was driving him into the ground."

About two weeks ago, things seemed to be changing for Hall, say those who helped him.

"He was trying to get his life together," said Bernard Gordon, with whom Hall had been staying. On Monday, the day his body was found, Hall was scheduled to go to Busch Gardens in Williamsburg for a job interview, Gordon said.

"He was a normal kid. He watched TV and videos," Gordon said, as he stood in his polo blue pajamas in the foyer of his 28th Street apartment hours after he learned about Hall's death. He said Hall spent most of his days at the apartment, but a social worker was about to place him in a program at a local school.

"He was nice looking, clean cut," Gordon said, describing Hall as having blond hair and blue eyes. "He was very observant. He noticed everything."

Gordon said he last saw Hall when the teen left the apartment Saturday night. Gordon said he thought Hall had gone to the party with his son, Raheem. "I didn't pay any attention when I woke up Sunday and he wasn't here. I thought he was at his mother's house.

"Every time I heard the door open, I thought it was him," Gordon said. Finally, on Monday, Gordon said he asked a family friend to go to Hall's mother's house.

Alicia's mother, neighbor Barbara Roberson Thrash, said she allowed Hall to sleep on her couch if he got locked out at Gordon's. She fed him whenever he was hungry.

"He was quiet and easy going — not any trouble," Thrash said. "He just didn't have what a child that age needed."

"He said his mom threw him out," she said.

Friends said Hall's mother was going to school to become a nurse and was taking care of her husband, who had cancer. Hall's father is dead, friends said.

Two weeks ago, Alicia said, Hall's outlook lightened. He told her that he was going to live with a relative in Florida as soon as he finished high school.

"He was so happy, so carefree. He was finally going to have a chance at a normal life," said Thrash.

"But the last week before he died, he had such a short temper — a short fuse if you said something he didn't agree with," she said. "Then he would up and disappear a lot. He'd just and wouldn't come back."

She and other teen-agers said they thought Hall's behavior was bizarre but dismissed it as "one of his moods."

"He was tired of always roaming around and never having a house," Thrash said.

And there were other incidents, his friends said.

Several weeks ago, Hall and his mother got into an argument and he pushed her out of his way, Alicia said. "Tim's mother put a violation out on him," she said.

When the police picked him up, Hall was carrying a gun, she said. As a result, Hall was ordered to spend a week in Gordon's apartment, Alicia said.

Hall started carrying the gun, she said, after two former classmates from Kecoughtan High School confronted him in front of Thrash's apartment on 28th Street and demanded money that he owed them.

"He grabbed a butcher knife and a hammer with an ax on the top and put them in his coat. Then he went downstairs to meet them," Alicia said. "He said: 'I'll be back.'"

But Alicia didn't see Hall until the next day when he called and told her: " 'I scared the guys away,' " she said.

Alicia and Hall's other friends don't believe those two men were responsible for his death. Instead, most said, they think Hall's desperate attempt to have a normal life eventually entangled him in one that promised quick cash and minutes of discomfort.

"We're feeling guilty, quiet and grieved. Murderously angry," she said. "If we find the guy that had something to do with this, it's going to be a battle of who gets him first — the cops or us."

Place

Continued from B1

on the underside of the concrete slab that forms a parking deck.

Two years ago, White said she used to see the same five or six people. She surmised they were alcoholics and even had a name for them.

She called the group "The Hole in the Wall Gang."

"They would hang around and drink themselves into oblivion," she said.

On several occasions, White took some of the people to the hospital for emergency treatment, including one who had cut a thumb.

"We just kind of tolerated them because I guess I never felt they were a danger to me or anybody else," she said.

In the last two years, however, after several of the original vagrants died, White said she's noticed a different breed of street person.

More drug addicts, she claims.

White and other residents have found discarded needles amid

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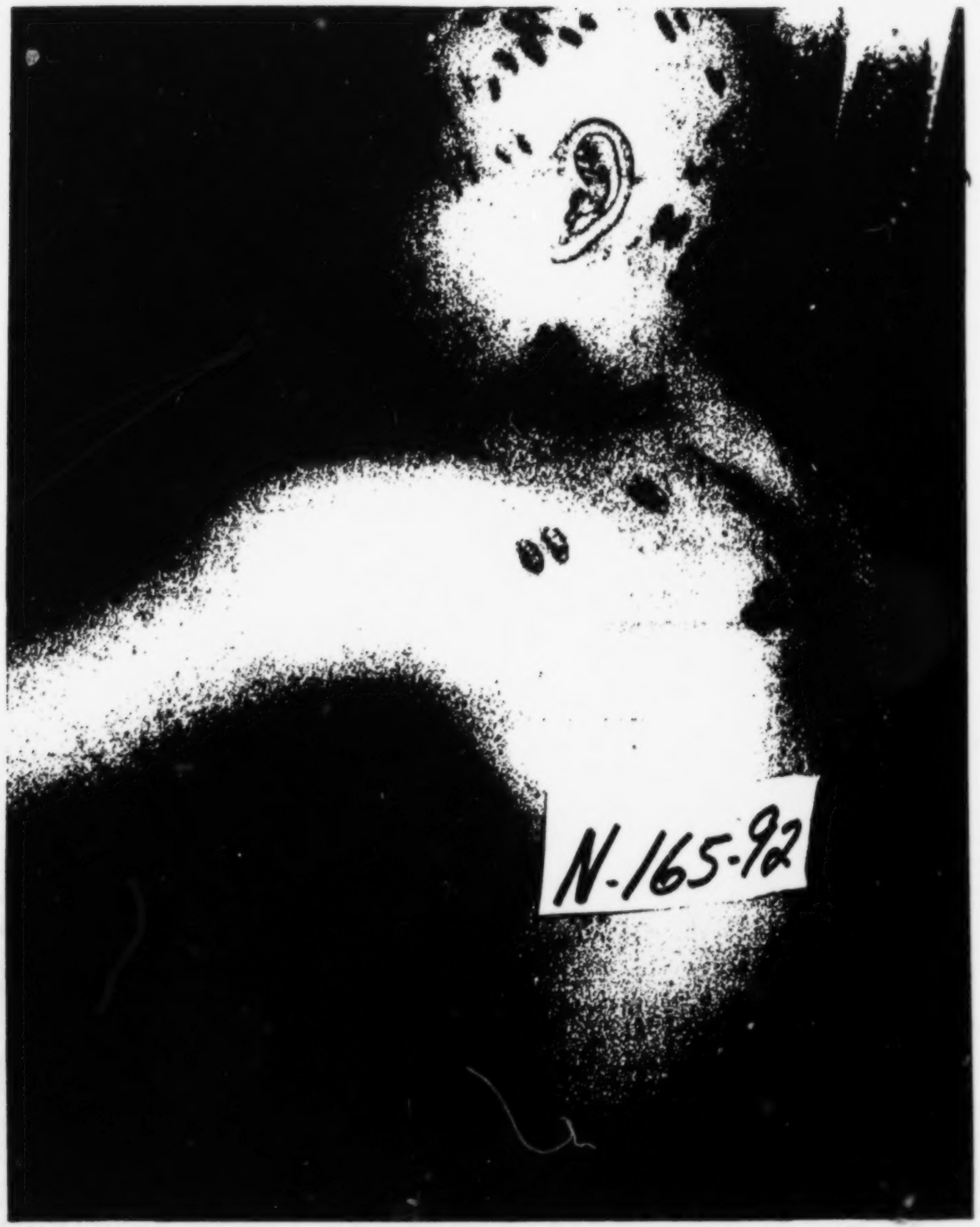
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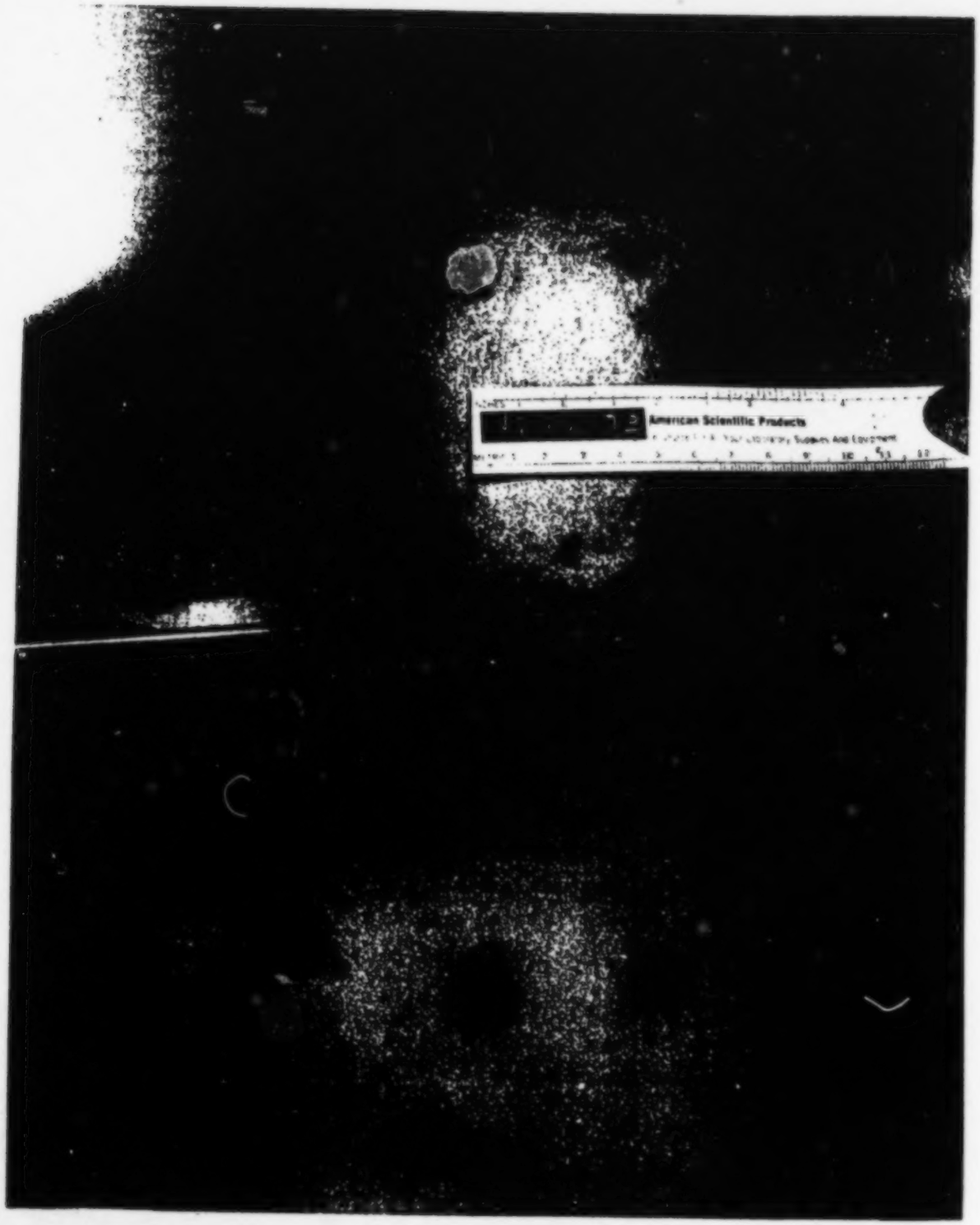
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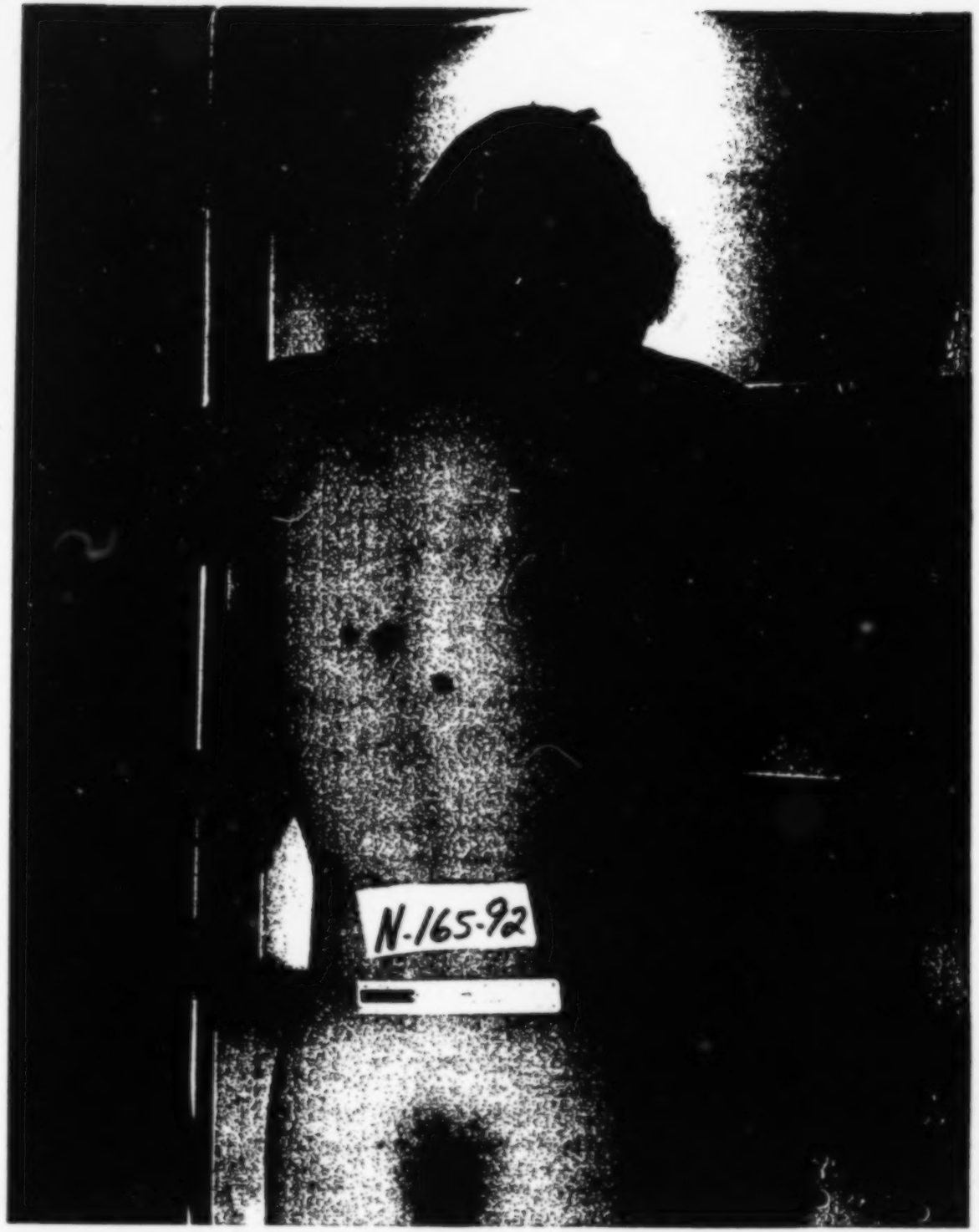
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murder scene is under that.
Q. Have you actually been to the location where the body was found?
A. Oh, yes.
Q. Can you tell us how you get to that location?
A. You have several ways of getting to that location. I walked it the way --
THE COURT: Excuse me. Is it any different than you testified to on direct about the several different ways you could get to it?
MR. HARRIS: That was Mr. Keeling, Your Honor.
THE COURT: Oh, Keeling. I'm sorry. Thank you. I'm sorry, Mr. Harris.
A. I walked it from the -- in the same manner that the gentleman who found the body did, which means that you have to go down to -- actually I don't think the street is shown on here. 22nd, 23rd Street, and go down to the river and then walk up the shoreline. You can get down by dropping off the bank, but --
THE COURT: Is 22nd, 23rd Street, is that where those big barges are parked down there as the road turns?
THE WITNESS: Yes, sir, that's where they are at.

THE COURT: What kind of barges are those?
THE WITNESS: I'm not sure.
THE COURT: Or ships.
THE WITNESS: I'm not sure what they are, Your Honor. I know what ships you're talking about.
THE COURT: The big gray ships?
THE WITNESS: Yes, sir.
THE COURT: And then you go down there to the river and walk around and up back west towards Richmond, right?
THE WITNESS: That's correct, Your Honor. And you can walk down the shoreline to there or a couple blocks further west towards Richmond which is not shown on this, there are a set of steps leading down to the river.
BY MR. HARRIS:
Q. The diagram shows 29th Street leading up to the Basic Construction building?
A. That's correct.
Q. Do you recall at what numbered street the steps would be?
A. It might be 30th, it might be 31st or 32nd Street. All I know is -- I didn't know they were there until I walked. I wasn't going to climb up the bank, and I just kept walking, and there they were, so I came up

the stairs.
BY MR. HARRIS:
Q. You testified earlier concerning your recollection that you had some information that the victim would sit on the riverside on occasion, that he had gone down there on prior occasions?
A. Where it came from, when I got it, I don't recall, but that's the information I had.
Q. And you were asked whether or not you made any attempt to contact the victim's girlfriend to verify that information; is that correct?
A. That's correct, I was asked that.
Q. Do you have any reason to believe that the victim's girlfriend would talk to you when you're representing the man charged with killing her boyfriend?
A. I can't answer that question. I don't know whether she would or not.
THE COURT: Good for you.
Q. If I can ask you generally about this high crime area. On the diagram that you have in front of you, is any part of the map area or prostitution area that you were ever familiar with reflected on this map?
A. Sir, I have represented some prostitutes in the past and they hand them the map. I don't look at it.

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times, is W-O-S-K-O-B-O-N-I-K, one word. It's a last name.
Q. After you were appointed and Mr. Saunders were appointed to this case, did the two of you ever meet and set down and decide who was going to investigate the case?
A. We both investigated it. I don't recall what decision we made. We didn't make a decision that I was going to investigate it and he wasn't or vice versa.
Q. So is it your belief that both of you were investigating?
A. That's my belief.
Q. Both the defense and the guilt phase and the possible evidence for sentencing?
A. I think initially; although, I also recall telling Mr. Saunders that I would take the family. They would call me, and I would have them come to my office, keep them informed because early on we knew that Mr. Saunders was going to do the trial. And if Mr. Mickens is found guilty, then I would be presenting evidence in way of the family and whatever else we could get for the sentencing phase.
THE COURT: So basically Saunders investigated the guilt-phase questions, and you

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investigated the sentencing-phase questions. Is that what your answer means?

THE WITNESS: Yes, Your Honor.

Q. Did you also investigate the guilt phase issues?

A. Yes.

Q. Did you go out and talk to witnesses that might know something about the crime, the murder of Timothy Hall?

A. I talked to -- I can't call them witnesses because I didn't get anybody to tell me anything, anything definite, but yes, I did go out and ask people. And there's a Corner Store there that would have been mentioned in the deposition, that I had gone in a couple of times to see if anybody knew Timmy Hall, but I didn't get any results from that. And the reason I went there is because he lived pretty much across the street.

Q. In that part of downtown Newport News there was a nearby store?

A. Something like the Corner Store or Corner Grocery or something to that effect.

Q. How many times did you go there?

A. Several times.

Q. Did you speak to any other witnesses in the neighborhood who might have known Timothy Hall?

A. I talked to -- I think it was the father of the family that he was living with. I think that was way in the preliminary hearing.

Q. Would that be Bernard Gordon?

A. Yes, the Gordon family. Rashad Gordon's father, I believe.

Q. Is Mr. Gordon the witness who died before trial? If you recall?

A. I don't recall him dying, but there was another witness who died. He was a person who had gotten some tennis shoes, and I can't think of his name right now.

Q. I'll move on. As far as the evidence of this newspaper article that you've been shown that talks about the finding of a body and the discussion with people who knew Timothy Hall, that is undated in the record.

Do you know about when that was in relation to the time of the crime?

A. No, I don't, but I would presume it was in April of that year. The article, itself, had comments from others who were adamant that he wasn't a homosexual.

Q. Well, let me ask you about this: You had information, then, from this newspaper article -- I take it you saw this newspaper article soon after you were appointed?

A. Correct.
Q. Even if it had actually been published before you had been appointed to represent Mickens?
A. Correct.
Q. And based on that information in the article, did you conduct any investigations at all to try to determine whether or not Timothy Hall was a male prostitute or a homosexual?
A. Yes.
Q. What did you do?
A. I talked to a lady at church, and I went to the Corner Store a number of times to ask people if they had known Timmy Hall. I just basically said who I was, and I was working on that particular case.
Q. And you mentioned you talked to the father of the family where he was living?
A. Right.
Q. Did that man indicate to you in any way --
MR. WAGNER: Can we have a time frame, please?
MR. HARRIS: I'm sorry?
MR. WAGNER: Can we have a time frame, please?
THE WITNESS: I believe at the day of the preliminary hearing is my recollection is when I

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talked to Mr. Gordon about Timmy Hall.
BY MR. HARRIS:
Q. Did you have any indications from Mr. Gordon that Timothy Hall was homosexual?
A. No.
Q. Or a male prostitute?
A. No.
Q. That he used drugs?
A. I didn't get that from Mr. Gordon.
Q. That he drank?
THE COURT: Let's go back. The series of questions was what efforts you made personally to determine whether he was or wasn't a male prostitute.
Did you talk with Mr. Gordon about whether he was or wasn't a male prostitute at the preliminary hearing?
THE WITNESS: Yes.
THE COURT: What did Mr. Gordon tell you?
THE WITNESS: To his knowledge he said Timmy wasn't. Your Honor, Mr. Hall had moved in and lived in his house, but he hadn't been there what I would call an extended amount of time.
BY MR. HARRIS:
Q. Now, the area where Mr. Gordon lived and where Timothy Hall lived for this period of time is in

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downtown Newport News?
A. Yes.
Q. And in that general area of Newport News, you indicated earlier that was an area known for prostitution?
A. Correct.
Q. Is that the same area where Timothy Hall lived with the Gordons?
A. Yes.
Q. So he lived in an area that was known by someone as an area for prostitution?
A. Yes.
Q. As far as the -- and the only reason he lived there is because he lived with the Gordons, as far as you knew?
A. As far as I knew. He was not living with his mother at the time.
Q. Did you talk to any other witnesses about -- well, let me back up a minute.

You indicated you spoke to a woman in your church about whether Timothy Hall was a homosexual?
A. Uh-huh.
Q. Can you answer that question out loud?
A. Yes, I spoke to her, and I would have asked her if she knew if he was a homosexual or not.

Q. Did she bring this to your attention, or did you seek her out?
A. I sought her out.
Q. And in the context of the question you were asked a little while ago about whether the women told you that he was a homosexual, was that information they volunteered, or was their uncertainty a response to a question you asked them?
A. I would have asked them if they knew if he was a homosexual. They wouldn't -- I mean, I asked all the questions when I spoke to the lady. The way that came about is somebody at my location said, "Oh, I remember when I used to go down there I knew Timmy from when he was younger." And she, I believe, gave me a name -- whoever it was I spoke to, and I don't remember who it was. She was fairly elderly at that time.
Q. Once you learned there was someone in your church who knew Timothy Hall, you went to that person and asked them information about Timothy Hall?
A. Right.
Q. Other than Mr. Gordon, the lady at your church and the people at the Corner Grocery store, is there anyone else you spoke to in investigating whether or not Timothy Hall was a homosexual or a male prostitute?

A. Not that I know of.
Q. Did you speak to any --
THE COURT: Excuse me, Mr. Harris.
Why were you asking people whether he was a male prostitute or a homosexual? Why were you asking those questions?
THE WITNESS: Hopefully to find some evidence about the victim that we could use as admissible evidence at trial.
THE COURT: To do what?
THE WITNESS: In a sense put the victim's, what little we could, character at issue.
MR. HARRIS: Your Honor, if your question is if the why question was more temporal, then these investigations you did was after you saw this information in the newspaper?
A. Yes. And I --
BY MR. HARRIS:
Q. Is that what prompted you to investigate this?
A. Yes. I would say yes.
Q. Now, you're an attorney. You have been practicing law for almost 20 years?
A. Yes.
Q. Are you familiar with the rape shield statute in Virginia?

PUBLISHER'S NOTE:

Page 20 is not available at this time and as soon as it becomes available it will be sent to you at that time.